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# Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements

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# RECONCILING DEVELOPMENT AND NATURAL BEAUTY: THE PROMISE AND DILEMMA OF CONSERVATION EASEMENTS

*Zachary Bray\**

*Local and regional private land trusts are among the most important and most numerous conservation actors in contemporary America, and conservation easements are perhaps the key land conservation tools used by these trusts. In recent decades, privately held conservation easements and local and regional private land trusts have grown at a rapid and increasing rate, and the total acreage protected by privately held conservation easements is now larger than some states. The early growth of privately held conservation easements met widespread approval, but more recently, contemporary conservation easement practice has attracted many critics, based in part on well-publicized national scandals involving fraudulent donations of conservation easements for tax purposes and in part on more general concerns about the potential inefficiency of these easements. To date, however, legal scholars have not adequately tested or examined these concerns against the details of contemporary conservation easement practice. This Article addresses this gap in the current debate by examining various criticisms and proposals for reform of current conservation easement practice in light of a detailed survey of conservation easements held by local and regional land trusts in Massachusetts. More specifically, the Article provides important detail on contemporary conservation easement practice, considers the interaction between contemporary practice and the abstract concerns raised in the academic debate, and offers some suggestions for reform and further study.*

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\* Associate, Munger, Tolles & Olson, LLP; J.D., Yale Law School, 2005. The research for this Article began under Professor Robert Ellickson's supervision, and I am grateful for his advice and his comments on earlier drafts. I am also grateful to David Tully, a volunteer with the Dunstable Rural Land Trust, and to all the volunteers at land trusts throughout Massachusetts with whom I spoke while conducting the research for this Article, for their time and consideration in discussing the details of their activity and experience. I would also like to thank Zachary Katz, Lisa Marshall Manheim, Larry Schwartztol, and Adam Sofen for their review of and helpful comments on previous drafts, as well as Daniel Mach, Arthur Calzontzi, and the rest of the staff at the Harvard Environmental Law Review. All remaining errors are, of course, my own.

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## INTRODUCTION

*The dilemma which confronts society is not to choose between development and open space. It is, rather, to reconcile their heretofore conflicting goals. The result will be a new form of 'creative development' which recognizes the needs of progress, but will not sacrifice to them the equally important values of natural beauty.<sup>1</sup>*

Outside Dunstable, Massachusetts, near the New Hampshire border, the Dunstable Rural Land Trust ("the Trust") protects land with scenic, historic, and ecological value. The Trust protects some of this land through outright

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<sup>1</sup> Chaplin Bradford Barnes, *The Conservation Easement: A New Device for the Preservation of Open Space* 85 (1965) (unpublished manuscript, on file with Goldman Memorial Library, Yale Law School).

fee ownership; in other words, the Trust is the only owner of the land. Some of the protected land, however, is not directly owned by the Trust. Instead, the Trust protects this land through conservation easements, holding only the easements that prohibit various general and specific land uses. The underlying fee interests on these easement-protected lands are still held by the landowners who donated the easements to the Trust, or their successors. These landowners received federal tax deductions for their donations and lowered property assessments based on the development value foregone by the easements. All told, the Dunstable Rural Land Trust protects over 800 acres of land in northern Massachusetts through fee and easement.<sup>2</sup>

The protection of land by local land trusts through conservation easements is a recent but increasingly common phenomenon. At the Dunstable Rural Land Trust, as at other similar land trusts across the country, trust volunteers typically work out the details of conservation easements with individual landowners, occasionally consulting with other land trust practitioners in the region. Trust volunteers also attempt to monitor both their fee and easement properties throughout the year. In the case of easement-protected land, this monitoring is partially intended to ensure that the landowner complies with the easement's restrictions.

Beyond monitoring the land it protects, the Dunstable Rural Land Trust engages in outreach activities to promote conservation awareness and social bonding among its members and the broader local community. Members of the Trust issue a local newsletter that describes the Trust's activities,<sup>3</sup> welcomes new members,<sup>4</sup> describes local wildlife activity,<sup>5</sup> and explains to

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<sup>2</sup> E-mail from David E. Tully, volunteer with the Dunstable Rural Land Trust, to author (Mar. 4, 2009, 11:28 EST) (on file with author). Of this protected land, the vast majority — over 700 acres — is held in fee. *Id.* As recently as a decade ago, this proportionally high ratio of fee-protected land relative to easement-protected land would have been unremarkable, but today it makes the Dunstable Rural Land Trust something of a throwback: as will be seen below, as a result of the recent meteoric growth in the amount of land protected by privately held conservation easements, today over half of all land protected by private land trusts is protected by conservation easements. See LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT 8 (2006), available at <http://www.landtrustalliance.org/about-us/land-trust-census/2005-report.pdf>.

<sup>3</sup> See, e.g., David E. Tully, *What Is Happening at the Dunstable Rural Land Trust Property on Main Street*, D.R.L.T. NEWS (Dunstable Rural Land Trust, Dunstable, Mass.), Apr. 2005, at 3.

<sup>4</sup> See, e.g., *Welcome Lisa Dingle!*, D.R.L.T. NEWS (Dunstable Rural Land Trust, Dunstable, Mass.), Apr. 2005, at 1.

<sup>5</sup> See, e.g., Coral Webber, *The Wildlife of Dunstable Rural Land Trust — Wildlife Preserve*, D.R.L.T. NEWS (Dunstable Rural Land Trust, Dunstable, Mass.), Apr. 2005, at 2. Ms. Webber writes:

Beavers, lots of beavers. In the spring, if you stand on their lodge, you can hear the babies, mewling and crying. The evidence of their tree work is obvious in several different areas of the land trust. Mink, ermine and otters are also here. . . . My grandson and I were lucky to see a snowshoe hare in his winter white coat. He was very visible as there was no snow on the ground. . . . A very big snapping turtle can often be seen sunning himself on the side of the beaver's lodge. Other turtles include red-eared slider, painted and wood turtle. During June you may see turtles on the sides of the trails quite far from their pond. . . . Every walk or trail ride you take,

local landowners how they can create conservation easements to protect their land from future development.<sup>6</sup> Members conduct nature walks on trails maintained by the Trust,<sup>7</sup> clear and restore wildlife habitats on Trust-protected land,<sup>8</sup> teach local students outdoor skills,<sup>9</sup> and organize annual town-wide cleanup efforts.<sup>10</sup> They sell photo calendars of scenic local properties to raise money for the Trust's operating expenses<sup>11</sup> and maintain and update a website about the Trust and the local community.<sup>12</sup> Finally, every year in late January, Trust volunteers hold "Winterfest," a community-wide outdoor festival attended by hundreds of local residents, with ice fishing demonstrations, sleigh rides, cross-country skiing, and potluck refreshments.<sup>13</sup>

The work the Dunstable Rural Land Trust does is of uniquely local value, and the breadth and depth of its outreach work suggest that it may be good at increasing local awareness and appreciation of those conservation values it seeks to protect. But it is not a unique type of institution. In the past twenty years, the number of private land trusts has exploded, as has the number of conservation easements held by such trusts. Conservation easements held by private land trusts now cover a vast, and steadily growing, swath of the United States. But while private land trusts and privately held conservation easements have been growing by leaps and bounds, popular and academic attention to these novel conservation tools and organizations has failed to keep pace. In particular, there have been almost no detailed

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you will observe something of the wild. Perhaps the remains of a hawk kill, a turtle sunning on a rock, an owl perched on a branch of a pine tree or a deer emerging from the woods. There . . . will always be something to amaze you.

<sup>6</sup> See, e.g., *To Create an Easement*, D.R.L.T. News (Dunstable Rural Land Trust, Dunstable, Mass.), Apr. 2003, at 3.

<sup>7</sup> See, e.g., *Winterfest 2003*, D.R.L.T. News (Dunstable Rural Land Trust, Dunstable, Mass.), Apr. 2003, at 1 ("Considerable efforts . . . by many of our members provided opportunities for cross-country skiing and snowshoeing. Trails were cut, widened and marked on our newly acquired property as well as the property owned previously.").

<sup>8</sup> See, e.g., *Mowing & Cutting Brush Ongoing at DRLT Wildlife Preserve*, D.R.L.T. News (Dunstable Rural Land Trust, Dunstable, Mass.), Apr. 2007, at 2.

<sup>9</sup> See, e.g., Sharon Schmidt, *Orienteering — Learning a Lifetime Skill*, D.R.L.T. News (Dunstable Rural Land Trust, Dunstable, Mass.), Apr. 2006, at 1 ("The Dunstable Rural Land Trust is excited to support an orienteering enrichment program this Spring for the third grade class at Swallow Union School entitled *Introduction to Orienteering — Learning a Lifetime Skill*.").

<sup>10</sup> See, e.g., *Town Wide Earth Day Celebration 'Clean Sweep Campaign' April 15th–22nd*, D.R.L.T. News (Dunstable Rural Land Trust, Dunstable, Mass.), Apr. 2007, at 3.

<sup>11</sup> See, e.g., *2006 Calendars Sold Out!*, D.R.L.T. News (Dunstable Rural Land Trust, Dunstable, Mass.), Apr. 2006, at 2.

<sup>12</sup> See Welcome to the Dunstable Rural Land Trust, <http://web.me.com/leedingle/drlt.org/Welcome.html> (last visited Dec. 31, 2009) (on file with the Harvard Law School Library).

<sup>13</sup> See, e.g., *Winterfest 2006*, D.R.L.T. News (Dunstable Rural Land Trust, Dunstable, Mass.), Apr. 2006, at 2 ("Although we had above-average temperatures and little snow, many people turned out Sunday, January 29th for the Annual DRLT Winterfest. The pond was not frozen enough to offer ice-skating, ice fishing or ice cutting, but the popular horse drawn sleigh rides provided a festive atmosphere. Thank you to the Boy Scouts who served hot chocolate, soup, and other refreshments while they maintained the bonfire and to all the volunteers who helped make this day possible.").

empirical examinations of contemporary easement practice in the legal academic literature.<sup>14</sup>

This Article addresses the empirical gaps in our current understanding by examining the actual conservation easement practices of local and regional private land trusts in Massachusetts, a jurisdiction that has often been suggested as a model for reform and that therefore provides unique insight into contemporary conservation easement practice.<sup>15</sup> The survey contained herein reviews 113 Massachusetts conservation easements, making this Article the most substantial and detailed empirical examination of contemporary land trust and conservation easement practice available in the legal academic literature. Through its survey, this Article seeks to set forth some initial, detailed impressions of contemporary practice and clear away some of the brush that currently obstructs the limited popular and academic debate. To that end, this Article and its survey will focus on the following questions and issues most pressing for current conservation easement practice. First, what is the significance of the federal tax deduction for the recent growth of conservation easements and private land trusts, and what is its significance for current conservation easement practice? Second, how serious are the problems of fraud and facial permanence identified by critics of current conservation easement practice, and how do they relate to the federal tax deduction? Third, are the purported benefits of conservation easements in the present worth the substantial public expense in terms of foregone tax revenue, or might other conservation alternatives achieve these benefits more cheaply? Fourth, and finally, are there any potential reforms of current con-

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<sup>14</sup> Many of the scholars and articles discussed at some length in this piece incorporate specific or anecdotal examples taken from various jurisdictions as illustrative examples of current practice. See, e.g., Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 750–51 (2002) (surveying variations in state easement-enabling statutes); Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006) (exploring the possibility of easement amendments through a real-world example). However, none provides a systematic survey based on contemporary practice, as does this Article.

At present, so far as the author is aware, only one legal academic study has systematically examined actual easements to gain insights into current conservation easement practice and to test theoretical concerns and prescriptions for reform against current practice. See James Boyd, Kathryn Caballero & R. David Simpson, *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209 (2000). However, the sample of easements examined in that study was much smaller and less focused on smaller private land trusts than the sample studied in this Article. Boyd et al. examined only eighteen total conservation easements in Florida, thirteen of which were held by local government agencies, and five of which were held by The Nature Conservancy, the largest private conservation organization and the epicenter of the recent tax scandals. See *infra* note 128 and accompanying text.

This paper focuses on Massachusetts, one of the most important jurisdictions for the study of conservation easements in the United States, including conservation easements held by private regional and local land trusts. In so doing, it represents one of the broadest and deepest examinations in the academic literature of conservation easements held by local and regional trusts.

<sup>15</sup> See *infra* Part III.A.

servation easement practice that might address the substantial concerns summarized above?

## I. THE HISTORY AND PRESENT EXTENT OF LAND TRUSTS AND CONSERVATION EASEMENTS

According to the Land Trust Alliance's most recent National Land Trust Census, 24 million acres were conserved by state and local land trusts as well as national land conservation groups in 2000. Five years later, the total acreage protected by all such organizations increased by fifty-four percent, to 37 million total acres in 2005.<sup>16</sup> This is an immense amount of land, which is helpfully put into perspective by the Land Trust Alliance's report: 37 million acres is more than sixteen times the size of Yellowstone National Park.<sup>17</sup> The proportion of this total held by local and state land trusts alone is a smaller but still immense total: 11.9 million acres in 2005,<sup>18</sup> up from 5.8 million acres in 2000.<sup>19</sup> The total acreage protected by state and local land trusts holding conservation easements (rather than alternatives such as fee ownership) is smaller still, but remains larger than Vermont.<sup>20</sup> Local and state land trusts held conservation easements protecting over 6.2 million acres in 2005 (or over half of the total acreage protected by local and state

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<sup>16</sup> LAND TRUST ALLIANCE, *supra* note 2, at 3–4. These totals, and all of the nationwide totals discussed below, are almost certainly substantially higher today for several reasons. First, as will be seen below, and as this Article's survey results suggest, the rate of growth for conservation easements has, if anything, likely increased from 2005 to the present. Moreover, because conservation easement extinguishment is, at present, an uncertain proposition, it is quite likely that very few, if any, existing conservation easements have been extinguished.

This uncertainty underscores the need for more detailed empirical work in this field. The national survey results published by the Land Trust Alliance offer a wealth of information at the broadest national level, but given rapid rates of growth, the sheer amount of land covered by the most recent conservation easements, and the diversity of different states' statutory and regulatory approaches to governing privately held conservation easements, current practice must be evaluated under more detailed and regular methods than those provided every few years by the Land Trust Alliance's substantial efforts.

<sup>17</sup> Yellowstone is a useful and interesting yardstick because it is, of course, itself protected land — albeit protected in a much different way than land protected by conservation easements and held by private landowners. A more salient yardstick for some readers may be to compare the total amounts discussed herein by reference to similarly sized states. Yellowstone itself is larger than the combined land area of Delaware and Rhode Island. NAT'L PARK SERV., U.S. DEPT OF THE INTERIOR, YELLOWSTONE PARK FACTS (2009), available at <http://www.nps.gov/yell/planyourvisit/upload/176facts09.pdf>.

Thirty-seven million acres (or 57,813 square miles), the amount of land protected through all methods by private conservation organizations in 2005, is larger than twenty-nine states — just smaller than Georgia and just larger than Michigan. See CENSUS BUREAU, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2009, at 213 tbl.344 (2008), available at <http://www.census.gov/prod/2008pubs/09statab/geo.pdf>.

<sup>18</sup> LAND TRUST ALLIANCE, *supra* note 2, at 4. This smaller total is still over five times larger than Yellowstone, and more than double the size of New Hampshire. See *id.*

<sup>19</sup> *Id.*

<sup>20</sup> Vermont has a total land area of 9250 square miles, just under 6 million acres. CENSUS BUREAU, *supra* note 17, at 213 tbl.344.

land trusts),<sup>21</sup> up from roughly 2.5 million acres in 2000<sup>22</sup> and 450,000 acres in 1990.<sup>23</sup> The total number of land trusts has also increased dramatically: from only a handful in 1950, and fewer than 600 in the mid-1980s, the total number of land trusts has increased to over 1200 in 2000 and well over 1600 in 2005.<sup>24</sup> In sum, after many years of slow or nonexistent growth, in the last two decades conservation easements held by private land trusts have transformed contemporary American land use in a dramatic fashion.<sup>25</sup>

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<sup>21</sup> LAND TRUST ALLIANCE, *supra* note 2, at 4. Using the standard discussed above, this is slightly less than three Yellowstones.

<sup>22</sup> *Id.*

<sup>23</sup> Nancy A. McLaughlin, *The Role of Land Trusts in Biodiversity Conservation on Private Lands*, 38 IDAHO L. REV. 453, 454 (2002).

<sup>24</sup> LAND TRUST ALLIANCE, *supra* note 2, at 4, 6.

<sup>25</sup> A brief note on terminology is in order before discussing the background history of conservation easements. As one recent study has pointed out, “[t]here is no such thing as a typical conservation easement.” Jeffrey A. Blackie, Note, *Conservation Easements and the Doctrine of Changed Conditions*, 40 HASTINGS L.J. 1187, 1215 (1989) (emphasis in original). Moreover, in a jurisdiction such as Massachusetts, the term conservation easement has no direct relevance at all; instead, one should properly speak of “conservation restrictions.” See, e.g., Karin Marchetti & Jerry Cosgrove, *Conservation Easements in the First and Second Federal Circuits*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 78, 89–91 (Julie Ann Gustanski & Roderick H. Squires eds., 2000) (discussing Massachusetts’s Restriction Statute). Although Massachusetts’s statute does not provide for “conservation easements,” it does provide for “conservation restrictions,” “agricultural restrictions,” “wetlands restrictions,” and “historical restrictions,” as will be seen below. All of these meet at least some of the criteria for “conservation easements” as that term will be used generally here. Accordingly, the term “conservation easement” has value as a generic term, even in a jurisdiction such as Massachusetts.

This Article uses the term “conservation easement” as a catch-all term for all legally binding agreements between a landowner and an easement holder that restrict the landowner’s use of the land, and grant the easement holder various rights to enforce those restrictions, in order to achieve one or more conservation goals. The Uniform Conservation Easement Act defines the term thus:

“Conservation easement” means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

UNIF. CONSERVATION EASEMENT ACT § 1(1) (2007). See also JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM 3 (2005), available at [https://www.lincolnst.edu/pubs/dl/1051\\_Cons%20Easements%20PFR013.pdf](https://www.lincolnst.edu/pubs/dl/1051_Cons%20Easements%20PFR013.pdf) (stating that a “conservation easement typically consists of permanently enforceable rights held by a land trust or government agency by which a landowner promises to use property only in ways permitted by the easement” and under which “[t]he landowner retains ownership and may convey [the land] like any other property, subject to the easement’s restrictions”). By “private land trusts,” I mean any tax-exempt private charitable organization “in the business of protecting open space” or other conservation values by holding fee or easement rights on protected land. Stephen J. Small, *Proper — and Improper — Deductions for Conservation Easement Donations, Including Developer Donations*, 105 TAX NOTES 217, 220 (2004), available at <http://stevesmall.com/uploads/22.pdf>.



A. *A Brief History of Conservation Easements and Land Trusts*

To fully appreciate both the extent of contemporary conservation easement holdings and the causes of their growth, it is first necessary to step back and look at the origins of private land trusts and conservation easements over a century ago. Although conservation easements and private land trusts were born together, at virtually the same time and place — in Massachusetts about a decade before the turn of the last century — they grew up apart. Neither private land trusts nor conservation easements assumed any real significance until the mid-twentieth century, around the time that the donation of conservation easements became subject to favorable tax treatment. Until the 1950s, conservation easements were used only sporadically and were held exclusively by governmental organizations. Private land trusts remained a novelty until about the same time. While broader social and political trends may have played a role in the evolution of these conservation tools, the historical record strongly suggests that recent growth in the number of private land trusts and the amount of land protected by conservation easements is primarily due to changes in the tax code.

1. *The Origins of Private Land Trusts and Conservation Easements*

The history of private land trusts begins in 1891 in Massachusetts, with the groundbreaking work of Charles Eliot<sup>26</sup> and the founding of The Trustees of Reservations (“The Trustees”).<sup>27</sup> Based on his undergraduate research, Eliot proposed the creation and structure of The Trustees in an 1890 letter to a periodical called *Garden and Forest*.<sup>28</sup> The following year, the Massachusetts legislature authorized the creation of this private trust,<sup>29</sup> and The Trustees have survived and maintained Eliot’s essential structure until the present day.<sup>30</sup> The number of private land trusts, both within Massachusetts and across the nation, grew steadily but very slowly over the first half of the twentieth century: by one estimate, in 1960 there were no more than 132

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<sup>26</sup> Charles Eliot’s college study has been credited as the first ecological survey ever undertaken. RICHARD BREWER, CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA 17–18 (2003).

<sup>27</sup> Originally called The Trustees of *Public* Reservations, this trust changed its name in 1954 to eliminate confusion about its private status. See The Trustees of Reservations, Trustees History, <http://www.thetrustees.org/about-us/history> (last visited Dec. 31, 2009) (on file with the Harvard Law School Library).

<sup>28</sup> See BREWER, *supra* note 26, at 16.

<sup>29</sup> The Massachusetts charter of incorporation established the organization’s mission of “acquiring and holding, for the benefit of the public, beautiful and historic places in Massachusetts.” *Id.* at 17. The charter also “included a second, all-but-essential, feature: tax exemption” as well as a promise “to keep the lands they owned open to the public.” *Id.*

<sup>30</sup> The Trustees protected land solely by means of fee interest holdings until 1972, when the organization began protecting land through conservation restrictions. See The Trustees of Reservations, Facts and Figures, <http://www.thetrustees.org/about-us/our-mission/facts-figures.html> (last visited Dec. 31, 2009) (on file with the Harvard Law School Library).

land trusts nationwide.<sup>31</sup> Essentially, these trusts relied exclusively upon full fee ownership, leases, or third-party pass-through transfers (usually to government agencies) to protect land.

The origins of conservation easements also can be traced to late nineteenth-century Massachusetts. The first servitude recognizable as a conservation easement was written in the late 1880s to protect Frederick Law Olmsted's Boston parkways.<sup>32</sup> These pioneer easements essentially stood alone until the 1930s, when the National Park Service began using conservation easements to protect its parkways as well.<sup>33</sup> In the early 1950s, the state of Wisconsin also began to acquire conservation easements to protect riverside and parkway land.<sup>34</sup> With these three exceptions, however, conservation easements were basically neglected for the first seven decades of their existence. Without specific state statutory authorization, conservation easements existed in a state of "dubious legality"<sup>35</sup> because some of their central characteristics were disfavored at common law: first, conservation easements are "negative" easements that tend to prevent rather than to grant land uses in perpetuity; and second, conservation easements are easements in gross. Specific statutory authorization, beginning in the mid-to-late 1950s and continuing through the late 1960s and 1970s, along with the creation and expansion of a federal tax deduction for conservation easement donations, proved necessary to remove this obstacle and create today's favorable conditions.

## 2. *Private Land Trusts and Conservation Easements Since 1959*

The decades-long history of incremental growth in private land trusts and essential stasis in the use of conservation easements began to change in the late 1950s. Change came first to conservation easements, as they became more widely accepted by the public and the academic community. The beginning of this process of national acceptance of conservation easements can be traced to William H. Whyte's landmark pamphlet, *Open Space for Urban America: Conservation Easements*, which was probably the first attempt to "explain[] and promot[e] this then-obscure conservation tool."<sup>36</sup> Whyte's work, though, should be understood as part of a larger renaissance of the American conservation movement that included the publication of *Silent Spring* in 1962<sup>37</sup> and the passage of numerous environmental laws: the Wilderness Act of 1964, the Water Quality Act of 1965, the National Environmental Policy Act of 1969, and the Endangered Species Act of

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<sup>31</sup> BREWER, *supra* note 26, at 39.

<sup>32</sup> Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, in PROTECTING THE LAND, *supra* note 25, at 9, 9.

<sup>33</sup> Jean Hocker, *Foreword* to PROTECTING THE LAND, *supra* note 25, at xvii, xvii.

<sup>34</sup> *Id.*

<sup>35</sup> Mahoney, *supra* note 14, at 749.

<sup>36</sup> Hocker, *supra* note 33, at xvii (quoting William H. Whyte).

<sup>37</sup> RACHEL CARSON, *SILENT SPRING* (1962).

1973.<sup>38</sup> Despite their roots in this broader conservation movement of the 1960s and early 1970s, private land trusts experienced their own rapid growth only after there was much wider knowledge and acceptance of the existence of conservation easements and the tax benefits of conservation easement donations.

Massachusetts was the first state to move toward explicit statutory authorization for widespread conservation easements. A 1954 statute enabled the Boston Metropolitan District Commission to purchase open space “in fee and otherwise [to acquire] lands *and rights in land*” for “exercise and recreation” in the Metropolitan Parks District.<sup>39</sup> A pair of 1956 acts authorized the Massachusetts Commissioner of Natural Resources “to obtain by gift, purchase or condemnation the fee, *or lesser interest*” in open land along a tourist route called the Bay Circuit in metropolitan Boston.<sup>40</sup> In subsequent years, further statutes authorized other towns to acquire conservation easements or development rights.<sup>41</sup>

In 1959, California expanded on Massachusetts’ example, providing statewide statutory authorization for county and city acquisition of open lands through “fee *or any lesser interest or right in real property* in order to preserve . . . open spaces and areas for public use enjoyment [sic].”<sup>42</sup> California’s statute “serve[d] as a model for similar legislation” in other states, as Connecticut, Illinois, and Maryland followed suit.<sup>43</sup> Over seventy years after their invention, government-held conservation easements swiftly passed from a little-known novelty to a cutting-edge conservation tool.

The rights to acquire and retain conservation easements were extended beyond national, state, and local government agencies to private land trusts as well as national, state, and local government agencies in a second great wave of legislative activity beginning in 1969. Massachusetts, along with Montana, led the way with its Restriction Statute.<sup>44</sup> By 1975, sixteen states had statutes enabling private acquisition and retention of conservation easements.<sup>45</sup> In 1981, the Uniform Conservation Easement Act (“UCEA”) was drafted, designed to enable “private parties to enter into consensual arrangements with charitable organizations or governmental bodies to protect land

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<sup>38</sup> See, e.g., Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131–1136 (2006)); Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903, *superseded by* 33 U.S.C. §§ 1251–1387 (1972); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321–4347 (2006)); Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531–1544 (2006)).

<sup>39</sup> Barnes, *supra* note 1, at 38 (emphasis added); see also MASS. GEN. LAWS ch. 92, § 79 (2008).

<sup>40</sup> Barnes, *supra* note 1, at 38 (emphasis added); see also Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638, 642 (1960).

<sup>41</sup> See Barnes, *supra* note 1, at 26–43.

<sup>42</sup> *Id.* at 26 (emphasis in original).

<sup>43</sup> *Id.* at 29.

<sup>44</sup> See MASS. GEN. LAWS ch. 184, § 32 (2008); MONT. CODE ANN. § 76-6-204 (2009).

<sup>45</sup> 4 POWELL ON REAL PROPERTY § 34A.02[2]-[3] (Michael Allan Wolf ed., 2009); see also Roderick H. Squires, *Introduction to Legal Analysis*, in PROTECTING THE LAND, *supra* note 25, at 69, 73.

and buildings without the encumbrance of certain potential common law impediments.”<sup>46</sup> By 1984, twenty-nine states had enabling statutes, though not all of these followed the UCEA.<sup>47</sup>

As statutory authorization expanded and the tax consequences for easement donation became entrenched,<sup>48</sup> private land trusts began acquiring conservation easements at a breakneck pace, which has steadily increased to the present day. As noted above, in 1990, private land trusts held conservation easements covering 450,000 acres.<sup>49</sup> By 1994, private land trusts protected more land through conservation easements than fee ownership.<sup>50</sup> From 1994 to 1998, the amount of land protected by privately held conservation easements nearly doubled, then nearly doubled again from 1998 to 2000, and then more than doubled again from 2000 to 2005.<sup>51</sup>

Like conservation easements, private land trusts grew slowly through most of the twentieth century, but they experienced a period of explosive growth beginning in the 1980s, roughly similar to the explosive growth of conservation easements. The growth of private land trusts in the last four decades of the twentieth century is best understood by reference to the growth of conservation easements. In 1965, seven decades after the establishment of The Trustees and six years after the first statutory authorization of government-held conservation easements, there were only about 130 land trusts nationwide.<sup>52</sup> By 1975, only one decade later, and only six years after the first statutory authorization of privately-held conservation easements, there were approximately 300 land trusts.<sup>53</sup> In 1981, just before passage of the UCEA, there were around 400 land trusts, most confined to states “either north of the Mason-Dixon line and east of the Mississippi or else within 50 miles of the Pacific Ocean.”<sup>54</sup>

The expansion of private land trusts after 1981 increased even more rapidly, making private land trusts arguably the dominant form of conservation organization in the United States. From 1981 to 2005, the annual growth rate of private land trusts was almost 6%, and within this period, the growth rate was at its highest, about 16%, from 1985–1988 — a period coincident with the early expansion of the federal tax deduction.<sup>55</sup> Although the growth rate of land trusts decreased somewhat after this initial peak, it remained positive. By 1996, private land trusts were recognized, in the words of a former director of the Sierra Club, as “the strongest arm of the

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<sup>46</sup> UNIF. CONSERVATION EASEMENT ACT, Prefatory Note (2007), 12 U.L.A. 168 (2008).

<sup>47</sup> See Squires, *supra* note 45, at 72–73 tbls.4.1 & 4.2. By 1998, forty-seven states had adopted easement-enabling statutes. *Id.*

<sup>48</sup> See *infra* Part I.B.

<sup>49</sup> See *supra* note 21 and accompanying text.

<sup>50</sup> See LAND TRUST ALLIANCE, *supra* note 2, at 6 fig.1.

<sup>51</sup> See *id.*

<sup>52</sup> See BREWER, *supra* note 26, at 39.

<sup>53</sup> See *id.*

<sup>54</sup> *Id.* at 34–35.

<sup>55</sup> *Id.* at 40.

conservation movement.”<sup>56</sup> Today there are over 1500 land trusts nationwide, and every state now contains at least a local branch of a national land trust that holds conservation easements.<sup>57</sup>

### B. The Federal Tax Deduction and Distributional Concerns

Defenders of private land trusts and privately held conservation easements often focus on the importance of easement donors’ allegedly altruistic environmental and conservation concerns,<sup>58</sup> and indeed, there is evidence that suggests many conservation easements are granted by donors motivated in large part by genuine environmental or conservation concerns.<sup>59</sup> It also seems likely that the rapid rise of conservation easements and private land trusts in the 1980s and 1990s was influenced to some degree by broader governmental and societal shifts toward market-based environmental initiatives during this time period — though whether conservation easements and land trusts are best described as part of this movement or a reaction against it is subject to debate.<sup>60</sup>

But while broader shifts in conservation preferences and an increase in sincere conservation concerns by individual donor landowners are certainly part of the story, the rise of conservation easements and private land trusts and contemporary easement practice are impossible to understand without reference to the creation and expansion of the federal tax deduction for easement donations. More specifically, the parallel growth and evolution of conservation easements and land trusts on the one hand and the federal tax deduction on the other, along with some of the recent scandals involving

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<sup>56</sup> *Id.* at 11 (quoting Michael Fischer).

<sup>57</sup> See LAND TRUST ALLIANCE, *supra* note 2, at 4, 16–22. However, with two exceptions, the top ten states in total number of land trusts remain largely a collection of Northeastern and Pacific coast states: California, Massachusetts, Connecticut, Pennsylvania, New York, Maine, Maryland, Wisconsin, Rhode Island, and Michigan. *Id.* at 11 fig.5.

<sup>58</sup> See, e.g., Jessica E. Jay, *Land Trust Risk Management of Legal Defense and Enforcement of Conservation Easements: Potential Solutions*, 6 ENVTL. LAW. 441, 451, 455 (2000) (describing conservation easements as “unique, dynamic tools used by private landowners and land trusts to preserve private lands,” and stating that “[l]andowners genuinely may be motivated to protect their environmentally unique property and devoted to the promise of preserving their land in its present state for perpetuity”); Boyd et al., *supra* note 14, at 212 (calling the “purchase of conservation easements” a “promising solution to [the] land use dilemma” and critiquing the lack of tax incentives); Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1078, 1085–91 (1996) (endorsing the continued use and value of the private “magic” created by conservation easements); Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs*, 43 CASE W. RES. L. REV. 401 (1993) (advocating federal acquisition of conservation easements to fulfill various agricultural and conservation goals and focusing on various efficiency gains over direct takings).

<sup>59</sup> See, e.g., BREWER, *supra* note 26, at 156–60 (discussing polling to support prevalence of conservation motivations among easement donors).

<sup>60</sup> See *id.* at 37–38 (focusing on the widespread public backlash to the “Reagan-Bush” environmental policies and James Watt’s tenure as Secretary of the Interior as the chief factor in the growth of public land trusts).

donated easements that amounted to little more than tax scams, strongly suggest a causal relationship. Furthermore, as this Article and its survey will show, even in Massachusetts — with its decades of experience with conservation easements and private land trusts — the growth rate for easements largely tracks the creation and expansion of the federal deduction. Accordingly, an appreciation of the creation and expansion of the federal tax deduction to easement growth in recent decades is essential in order to consider the criticisms and potential reforms of contemporary conservation easement practice.

### 1. *The History of the Tax Deduction Through 2001*

The availability of a tax deduction for conservation easements was announced in 1965 by an IRS News Release advertising that landowners donating scenic easements to federal, state, and local governments were eligible for a charitable income tax deduction.<sup>61</sup> In 1976, the deduction was codified in I.R.C. § 170(f)(3)(B),<sup>62</sup> but the availability of the deduction for donations to private land trusts was still somewhat uncertain.<sup>63</sup> In 1980, Congress enacted I.R.C. § 170(h), which allowed deductions for donations of conservation easements, provided that they were granted in perpetuity to qualified charitable organizations for one or more specific conservation purposes.<sup>64</sup> In 1984, Treasury Regulation § 1.170A-14 provided more clarity, listing various acceptable charitable purposes for the deduction and providing the appraisal rules for computing the amount of the deduction.<sup>65</sup> The

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<sup>61</sup> Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations — A Responsible Approach*, 31 *ECOLOGY L.Q.* 1, 11 (2004) (citing I.R.S. News Release No. 784 (Nov. 15, 1965)).

<sup>62</sup> See Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended in scattered sections of 26 U.S.C.). The 1976 codification authorized deductions “for the donation of a conservation easement having a term of at least thirty years, provided the easement was donated to a governmental unit or qualifying charitable organization exclusively for one or more of the following three conservation purposes: (i) the preservation of land areas for public outdoor recreation or education, or scenic enjoyment, (ii) the preservation of historically important land areas or structures, or (iii) the protection of natural environmental systems.” McLaughlin, *supra* note 61, at 12. The statutory basis for the deduction is now based on the interaction of § 170(f)(3)(B)(iii) and § 170(h) as a result of further statutory revisions beginning in 1980. See *infra* note 67.

<sup>63</sup> See McLaughlin, *supra* note 61, at 12–13 (noting that “Congress did not indicate whether it intended the new deduction provision, with its conservation purposes requirement, to supersede the deductibility of ‘open space’ easements based on” an earlier report).

<sup>64</sup> Under § 170(h) of the tax code, as enacted in 1980, an easement qualifies for the charitable income tax deduction specified in § 170(f)(3)(B)(iii) only if it is donated: (i) in perpetuity; (ii) to a governmental unit or publicly-supported charity (or satellite of such charity); and (iii) for one or more of the following conservation purposes, often known as the “conservation purposes test”: (a) the preservation of recreational and educational areas; (b) the protection of natural ecosystems; (c) the preservation of historically significant sites; or (d) the preservation of open space, where this preservation will yield public benefit and is either for scenic enjoyment or pursuant to government conservation policy. 26 U.S.C. § 170 (2008); see also McLaughlin, *supra* note 61, at 14–15 (explaining the evolution and impact of § 170(h) in 1980 and immediately thereafter).

<sup>65</sup> Treas. Reg. § 1.170A-14 (1984).

Department of the Treasury issued further regulations with additional guidance and examples in 1986.<sup>66</sup> These revisions and clarifications were the product of substantial input from the conservation community,<sup>67</sup> but despite the strong and consistent influence of conservation interests in clarifying the availability of the tax deduction, those involved with the effort have claimed that the field of conservation easements and their associated tax deductions remained "a sleepy little field, generally marked by conservation easements donated . . . on property that had been in the family for decades, if not generations."<sup>68</sup>

Subsequent reforms expanded the deduction beyond the income tax deduction to the estate tax. In 1986, Congress modified the estate and gift tax statutes to make clear that estate or gift tax deductions should be allowed for any transfer of a qualified real property interest meeting the requirements of section 170(h).<sup>69</sup> Additional estate tax deductions for conservation easements were provided by I.R.C. § 2031(c), codified in 1997 and further revised in 2001, which permitted the donor of a qualified conservation easement to exclude up to forty percent of the value of the land subject to the easement from the otherwise applicable estate tax.<sup>70</sup> During this period, from the mid-1980s until the turn of the last century, commentators in the field wrote, "the most significant development in the law is simply *the continuing development of favorable law* for easement donors and charitable donee organizations including land trusts."<sup>71</sup> In short, beginning in 1965 conservation easements were transformed by steadily and increasingly favorable tax treatment from a novelty into an accepted charitable deduction. The timeline of rapid conservation easement and private land trust growth corresponds with the statutory and regulatory amendments clarifying and extending the scope of the deduction beginning in the mid-1980s.

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<sup>66</sup> See T.D. 8069, 1986-1 C.B. 89.

<sup>67</sup> "In fact, in crafting § 170(h) and the Regulations, both Congress and the Treasury relied heavily on the experience and expertise of the conservation organizations acquiring easements." McLaughlin, *supra* note 61, at 15.

<sup>68</sup> Small, *supra* note 25, at 217-18. Mr. Small, who is currently a private practitioner and frequent commentator regarding contemporary conservation easement practice, was a participant in the drafting of § 170(h) and the author of portions of the relevant Treasury Regulations discussed above. See McLaughlin, *supra* note 61, at 10 n.20.

<sup>69</sup> Tax Reform Act of 1986, Pub. L. No. 99-514, § 1422, 100 Stat. 2085, 2716 (codified as amended at 26 U.S.C. §§ 2055(f), 2522(d)).

<sup>70</sup> The 2001 revision eliminated the requirement, present in the 1997 act, that to be eligible for the estate tax exclusion of § 2031(c) the land at issue must be located in or within ten miles of an urban national forest or in or within twenty-five miles of a metropolitan statistical area, national park, or wilderness area. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 551, 115 Stat. 38, 86 (codified as amended in scattered sections of 26 U.S.C.).

<sup>71</sup> STEPHEN J. SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS 1 (2d ed. Supp. 1996); see also STEPHEN J. SMALL, THE FEDERAL TAX LAW OF CONSERVATION EASEMENTS (3d ed. Supp. 2001) (noting that developments in the law, pronouncements by the IRS, and the courts continued to be favorable to donors of conservation easements).

## 2. *Continued Expansion of the Deduction Since 2001*

Since the 2001 revisions to I.R.C. § 2031(c), the trend of steady legislative and regulatory expansion of and support for the conservation easement tax deduction has continued. In 2004, in the wake of several scandals involving national land trusts and conservation easement deductions, the IRS issued a notice entitled “Charitable Contributions and Conservation Easements.”<sup>72</sup> In this notice, the IRS expressed its awareness of the fact that some donors of conservation easements to charitable organizations might be improperly claiming charitable contribution deductions under § 170 of the Internal Revenue Code.<sup>73</sup> The notice further stated that no deduction would be allowed for easement deductions that failed to meet the various public benefit requirements of § 170(h) and § 1.170A-14, or for conservation easements that had “no material effect on the value of real property, or [that] enhance[d] rather than reduce[d] the value” of the property they purportedly encumbered.<sup>74</sup> For some conservation advocates and practitioners in the conservation easement field, this notice was interpreted as a “shot across the bow” that could represent good news for land trusts by giving them an opportunity “to shut down the bad deals and clear the air,”<sup>75</sup> and subsequent commentary by IRS representatives reinforced this perception of the notice.<sup>76</sup>

More significant proposed rollbacks of the federal easement donation deduction soon followed. In January 2005 the staff of the Joint Committee on Taxation released a report and recommendations that, if adopted, would have dramatically reshaped the nature of current conservation easement practice by limiting deductions for a conservation easement to one-third of the easement’s appraised value and disallowing any deduction for easements on property used by the landowner as a personal residence.<sup>77</sup> In June 2005 the staff of the Senate Finance Committee issued a report on the well-publicized easement donation scandals associated with The Nature Conservancy,<sup>78</sup> which first focused national attention on the problems associated

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<sup>72</sup> I.R.S. Notice 2004-41, 2004-2 C.B. 31.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Stephen J. Small, *IRS Notice Could Be Good News*, EXCHANGE, Fall 2004, at 22, available at [http://www.cfinetwork.org/ltanet%20Exchange\\_23\\_04\\_07.pdf](http://www.cfinetwork.org/ltanet%20Exchange_23_04_07.pdf).

<sup>76</sup> See, e.g., Steven T. Miller, Comm’r, Tax Exempt and Government Entities, Internal Revenue Serv., Remarks Before the Spring Public Lands Conference (Mar. 28, 2006), available at [http://www.irs.gov/pub/irs-tege/miller\\_speech\\_3\\_28\\_06.pdf](http://www.irs.gov/pub/irs-tege/miller_speech_3_28_06.pdf) (“This notice sends a clear message. We refer to it as a ‘yellow light notice’ because it is cautionary in nature.”).

<sup>77</sup> See STAFF OF J. COMM. ON TAXATION, 108TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 281–83 (Comm. Print 2005), available at <http://www.jct.gov/s-2-05.pdf>.

<sup>78</sup> These problems were detailed in a series of stories in *The Washington Post* and elsewhere. Many of the worst abuses involved The Nature Conservancy’s “conservation buyer” program, in which the Conservancy would buy a parcel of land, subject it to a conservation easement, and then re-sell the land, often to supporters and occasionally to trustees at the greatly reduced estimated price of the land subject to the conservation easement. See, e.g., Joe



with some conservation easement donations. The Finance Committee's staff report noted that in general, "[c]onservation easements present issues in valuation as well as monitoring and enforcement in perpetuity" and that "[f]ailure to enforce" the restrictions set forth in conservation easements "increases the risk that easement-restricted property will not be conserved in perpetuity or that the actual conservation benefits will be less than what was claimed when the amount of the resulting charitable contribution was calculated."<sup>79</sup>

Conservation advocates mobilized to respond, and despite the concerns raised by the IRS, the Senate Finance Committee, and the Joint Committee on Taxation, legislation *increasing* the scope of the federal conservation easement deduction soon followed in the Pension Protection Act of 2006 ("PPA"), which was signed into law in August 2006.<sup>80</sup> In response to some of the concerns raised about fraudulent easement appraisals and deductions, the PPA provided new statutory definitions and new standards for the "qualified appraiser" and "qualified appraisal" that had always been necessary under § 170 to obtain the deduction, substantially increased the penalties for misstating the valuation of conservation easements on income tax returns, and eliminated the prior reasonable-cause defense to gross-valuation misstatements on income tax returns.<sup>81</sup> Despite the increased restrictions and scrutiny provided by these provisions, the PPA, with its expansion of the deduction limit and timeline for reporting the deduction, has nevertheless been viewed as a great victory, with conservation advocates noting that its "tax incentive helped America's land trusts increase the pace of land conservation by at least 535,000 acres compared to the previous two years!"<sup>82</sup> At present, however, the expansions of the deduction set forth in the PPA are only temporary. At the time of present writing, they will expire at the end of 2009 unless further extended by pending legislation — a fact which only

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Stephens & David Ottaway, *Nature Conservancy Suspends Land Sales; Board of Nonprofit to Review Practices*, WASH. POST, May 13, 2003, at A3.

<sup>79</sup> STAFF OF S. FIN. COMM., 108TH CONG., REPORT ON THE NATURE CONSERVANCY INVESTIGATION, at ES-3, ES-9 (Comm. Print 2005), available at <http://finance.senate.gov/hearings/other/tnccontents.pdf>.

<sup>80</sup> Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 U.S.C.).

<sup>81</sup> *Id.* § 1219, 120 Stat. at 1083–84. See also Joan B. Di Cola & Stephan R. Leimberg, *Conservation Easement & Appraiser Penalty Provisions in PPA 2006*, PLANNED GIVING DESIGN CENTER, Aug. 21, 2006, available at <http://www.pgdc.com/pgdc/article/2006/08/conservation-easement-appraiser-penalty-provisions-ppa-2006>.

<sup>82</sup> Land Trust Alliance, *How the Easement Incentive Works*, <http://www.landtrustalliance.org/policy/taxincentives/federal/incentive-info> (last visited Dec. 31, 2009) (on file with the Harvard Law School Library). Land trust organizations celebrated the PPA as an overall expansion of the federal deduction for at least three reasons. First, the PPA raised the federal deduction limit for a qualified conservation easement from 30% to 50% of the donor's adjusted gross income. Second, for donors meeting the statutory definition of a "qualified farmer or rancher," the PPA raised the deduction limit to 100% of adjusted gross income, provided that the property remained available for agricultural production after being encumbered with the easement. Third, it allowed donors sixteen years, rather than six under the prior statutes, in which to space out their deductions based on the easement donation. Pension Protection Act § 1206, 120 Stat. at 1068–70.

heightens the need for further detailed empirical work examining current conservation easement practice and its interaction with the deduction.<sup>83</sup> As the survey below indicates, these most recent reforms likely have, if anything, further accelerated the growth of privately held conservation easements in the last few years.

In sum, “the fact that the growth in the use of easements and the number of land trusts has so closely paralleled [the expansion and] evolution of the federal tax incentives strongly suggests that such growth is attributable, at least in part, to such incentives.”<sup>84</sup> This is true notwithstanding the role other factors, such as the approval of the Uniform Conservation Easement Act, changes in the popularity of conservation values, the creation of tax deductions in some states for easement donations,<sup>85</sup> and increasing development pressures may have played in some states. Moreover, the importance of the federal tax deduction is further suggested by the extensive lobbying and public education efforts mounted by national land trust organizations in recent years, some of which, as noted above, have expressly credited the most recent expansion of the easement deduction with helping to increase the growth of land trusts and the spread of conservation easements in the past three years. Future changes to the easement deduction — including the resolution of the presently temporary expanded scope of the deduction — are likely to have similarly far-reaching impacts, although the precise extent may continue to be difficult to measure.<sup>86</sup>

As will be seen below, many of the criticisms and proposals for reform of current practice revolve around three concerns related to the federal deduction: first, the high cost to the public fisc of conservation easements in terms of foregone revenue caused by these tax deductions; second, the fact that this cost is not fully imposed on or even known by the land trusts that draft and hold conservation easements or the local authorities that approve

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<sup>83</sup> Although the PPA’s incentives are currently set to expire on December 31, 2009, pending legislation in both the House and Senate would make the PPA’s easement incentives permanent. Pension Protection Act § 1206, 120 Stat. at 1069 (stating that “th[e]se subparagraph[s] shall not apply to any contribution made in taxable years beginning after December 31, 2007”); Food Conservation and Energy Act of 2008, Pub. L. No. 110-234 § 15302, 122 Stat. 923 (extending incentives until December 31, 2009); *see also* Conservation Easement Incentive Act of 2009, H.R. 1831, 111th Cong. (2009); Rural Heritage Conservation Extension Act of 2009, S. 812, 111th Cong. (2009).

<sup>84</sup> McLaughlin, *supra* note 61, at 22. As McLaughlin points out, “over 60 percent of the 1,263 local, state, and regional land trusts in existence as of December 31, 2000, were created after 1985, and approximately 88 percent of the acreage protected by conservation easements held by such land trusts as of December 31, 2000, was protected after 1988.” *Id.*

<sup>85</sup> *See* LAND TRUST ALLIANCE, *supra* note 2, at 4 (noting that “Colorado and Virginia are two of the few states offering a state tax incentive for conservation, operating in tandem with the federal incentive” and that both of them appear in the list of the top ten states with the highest total acreage conserved); *see also* PIDOT, *supra* note 25, at 31 (noting that “[t]he additional tax incentive schemes in states such as Virginia and Colorado should be questioned”).

<sup>86</sup> *Cf.* PIDOT, *supra* note 25 at 49–50 (noting that “the precise role played by tax incentives in motivating donations, and the level at which such incentives must be set to trigger donations are all unknown”).

them in jurisdictions such as Massachusetts; and third, the potential inefficiencies conservation easements may present to future decision makers as a result of the facial pretense of perpetuity required by the federal deduction. Accordingly, an appreciation of the importance of the federal tax deduction is essential to understand the extent and limits of the contemporary legal academic and popular debate.

## II. THE PRESENT DEBATE ABOUT CONSERVATION EASEMENTS

The response in both the legal academic literature and the popular press to the rapid growth in the number of private land trusts and the total acreage protected by conservation easements has been mixed. Legal scholars disagree about the efficacy and efficiency of conservation easements, the likelihood of their durability, the flexibility with which they suit diverse current conservation norms, their ability to adapt to shifting conservation norms in the future, and their distributional fairness.<sup>87</sup> For some, conservation easements represent a cheap, flexible, decentralized, and cost-effective way to protect land with important conservation attributes.<sup>88</sup> Others believe that conservation easements, and their rapid recent growth, constitute an under-examined and unwise use of limited public funds and conservation resources — one that causes potentially unfair distributional side effects in the present and that may lock future generations into inefficient and undesirable conservation commitments in the future.<sup>89</sup> Part II of this Article reviews the academic and popular debates about the merits of conservation easements and some proposals for reform of current practice, so that these criticisms and suggestions for reform can be evaluated in light of the survey results in Part III.

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<sup>87</sup> See *infra* Part II.A.

<sup>88</sup> See, e.g., Cheever, *supra* note 58, at 1077–79 (stating that private land trusts holding conservation easements represent “the most active and forward-looking element in the national effort for environmental preservation” and discussing the need to ensure that private land trusts have sufficient doctrinal and financial resources to defend presently-held conservation easements in the future); see also Jay, *supra* note 58, at 451 (stating that conservation easements are “unique, dynamic tools used by private landowners and land trusts to preserve private lands”).

<sup>89</sup> See, e.g., Mahoney, *supra* note 14, at 787 (concluding that “instead of helping us to avoid ‘meriting the curses of our successors,’ the extensive use of conservation servitudes as an anti-development tactic may create ecological, legal, and institutional problems for later generations” (quoting Annette Baier, *For the Sake of Future Generations*, in *EARTHBOUND: NEW INTRODUCTORY ESSAYS IN ENVIRONMENTAL ETHICS* 214, 215 (Tom Regan ed., 1984))); see also John D. Echeverria, *Skeptic’s Perspective on Voluntary Conservation Easements*, *ECOSYSTEM MARKETPLACE*, Aug. 31, 2005, at 1, available at [http://www.law.georgetown.edu/gelpi/current\\_research/documents/RT\\_Pubs\\_Short\\_EcoMarketplace.pdf](http://www.law.georgetown.edu/gelpi/current_research/documents/RT_Pubs_Short_EcoMarketplace.pdf), (arguing that “[c]onservation easements become especially problematic when they are not used as a scatter-shot approach to achieve isolated conservation goals, as was the case until very recently, but rather are understood as the dominant paradigm for conducting land conservation and management generally, as is increasingly the case today”).

*A. Permanence, Lock-in, and Conservation Alternatives**1. The Academic Debate and the Problem of Permanence*

In the mid-1980s, as conservation easements began their most rapid phase of expansion, the academic response was largely positive. As one scholar wrote, “[c]onservation servitudes seem to provide government and private associations with a cost-efficient alternative to fee acquisition.”<sup>90</sup> Over ten years later, it was still possible for scholars to refer to the “private magic” of the land trust movement and to claim that “[w]ith the exception of a few dissenting voices,” enthusiasm and support for “the land trust movement” was “almost universal.”<sup>91</sup> More recently, however, many responses to the expansion of land trusts and the increased use of conservation easements have become deeply critical.

Some critics are chiefly concerned about inefficiencies caused by “locking in” irreversible present conservation choices and values through conservation easements that cannot be dissolved or even amended. In the words of one leading recent study, although “the formidability and durability of [conservation easements] is as yet a matter of conjecture, there is good reason to worry that the costs of reversal will not be trivial,” and that therefore, “[f]uture generations may have to expend substantial resources in order to deal with outmoded restrictions.”<sup>92</sup> Land protected by private land trusts through outright fee ownership may be subject to some future inefficiencies, given the various restrictions on subsequent transfer that donors of fee interests or land trust charters may impose, but land protected by conservation easements held by private land trusts may add an additional layer of inflexible restrictions upon subsequent transfer or dissolution. At the very least, these critics argue, “supporters of conservation easements should think about designing these instruments so that land can be more easily freed from obsolete or injurious restrictions,” while recognizing that “designing such modifications is likely to be hard, given the reality that any provision that renders the conservation servitude easy to undo or relax should conservation values change may also make it less effective for its stated purposes.”<sup>93</sup>

The potential problem of lock-in created by most easements’ facial permanence is not simply a problem about potentially efficient future development that may be burdened or foregone by inappropriate easements. Indeed, these criticisms represent a broader concern shared even by some who generally support privately held conservation easements and the land trust movement. As a recent study authored by a conservation easement professional admits: “[b]eing human, it is not unthinkable that landowners who grant easements may change their minds about restrictions. . . . In our rush to

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<sup>90</sup> Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 444 (1984).

<sup>91</sup> Cheever, *supra* note 58, at 1085.

<sup>92</sup> Mahoney, *supra* note 14, at 769.

<sup>93</sup> *Id.* at 780.

craft the most stringent restrictions, we must take care not to create time bombs that may well detonate the reputation of the land trust involved.”<sup>94</sup> But the problem of lock-in represents potential threats beyond the merely reputational: today’s easements may frustrate future legitimate conservation initiatives as well as future development. For example, some scholars, scientists, and conservation activists have begun considering the desirability of “shifting” conservation easements to protect against species loss in the face of climate change, which might be designed to track migrating species in need of protection across different land parcels.<sup>95</sup> The creation of such shifting conservation easements, of course, may well be frustrated by the emphasis on facially permanent easements in contemporary practice arising out of the present federal deduction. Another potential example which some easement practitioners and conservation organizations have begun to explore is carbon sequestration on easement-protected land to reduce greenhouse gas concentrations.<sup>96</sup> If they depend on techniques such as reforestation or afforestation, future sequestration efforts might well be frustrated by facially permanent restrictions on land use in conservation easements drafted in the present. In other words, permanence or lock-in caused by facially permanent easements is a potential problem that may confront both development- and conservation-inclined future actors alike. It is a problem created by the current federal deduction requirement that easements must be facially permanent and compounded by the incredibly rapid, deduction-fueled growth of such facially permanent easements in recent decades.

On the opposite pole from critics and reformers concerned about too much permanence, present conservation easement practice has also been attacked by those who believe that the special durability of their protections is much *less* than it ought to be, given the significant tax benefits that accrue to easement donors. For example, although “[t]he idea that a conservation easement may be terminated is anathema to some landowners and land con-

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<sup>94</sup> John B. Wright, *Reflections on Patterns and Prospects of Conservation Easement Use*, in *PROTECTING THE LAND*, *supra* note 25, at 498, 499; *see also* Jeffrey M. Tapick, Note, *Threats to the Continued Existence of Conservation Easements*, 27 COLUM. J. ENVTL. L. 257, 263 (2002) (noting, in the context of an extended defense of conservation easements, that “[o]wing to their perpetual duration, conservation easements are unlike other land preservation measures in that they cannot be circumvented easily”).

<sup>95</sup> *See, e.g.*, Climate & Conservation Workshop, *Drafting Conservation Easements in an Era of Climate Change*, Woods Institute for the Environment (Feb. 23–24, 2009), <http://woods.stanford.edu/ideas/climateconservation/agenda.html> (last visited Dec. 31, 2009) (on file with the Harvard Law School Library).

<sup>96</sup> *See, e.g.*, Rally 2009: The National Land Conservation Conference, *Conservation and Carbon*, Land Trust Alliance (Oct. 11–14, 2009), <http://www.landtrustalliance.org/about-us/emerging-issues/climate-change/climate-change-seminars-workshops-at-rally-2009> (last visited Dec. 31, 2009) (on file with the Harvard Law School Library); ERIN CONSULTING LTD., INCENTIVES FOR CONSERVATION EASEMENTS TO SEQUESTER CARBON IN NORTH AMERICA (2004), *available at* <http://cfs.nrcan.gc.ca/files/333> (evaluating afforestation and reforestation incentives, including conservation easements, including “small and very localized land trusts” that target specific ecosystems, in both the United States and Canada). Of course, this sort of sequestration might be impossible to achieve on land protected by an easement that requires the land to be kept, for example, as farmland or pasture.

servation professionals,” conservation easement termination “is a real possibility” because changing “circumstances — and doctrines of law — may shorten the life of a conservation easement.”<sup>97</sup> While many proponents of conservation easements insist that their durability and facial permanence are positive features, many critics of contemporary practice believe that conservation easements “are likely to prove, over the long-term a good deal less permanent than easement advocates commonly contend.”<sup>98</sup> As a result, these critics suggest that conservation easements may constitute an unfair, perhaps even fraudulent, misuse of limited conservation resources because the federal deduction for conservation easement donors, which purports to reward them for an ostensibly permanent gift of development rights, may actually be rewarding a merely temporary transfer that can and will be amended in the future.<sup>99</sup>

Although these critical perspectives may seem inconsistent, they share a deep skepticism about the justification for and the practicality of long-range conservation choices made by individual actors, whatever form these conservation choices may take. For example, some critics who claim that conservation easements will impose an inefficient lock-in of present conservation values and interests also seem motivated, at least in part, by concerns or skepticism about the fundamental “problem of long-range planning, namely the curious confidence that humans tend to exhibit that ecological understanding is at last at hand, and that modern day science yields enduring truths instead of contingent hypotheses.”<sup>100</sup> Similarly, even those critics who are skeptical about the ostensible permanency of conservation easements may believe that “it is [at best] debatable whether, as a matter of sound environmental and broader social policy, it makes sense for the current generation to attempt to dictate conservation policy into the indefinite future.”<sup>101</sup> Such critics may favor regulation rather than conservation easements as more effective, more equitable, and immune from the contradictory permanence issues arguably inherent in conservation easements.<sup>102</sup>

At some level, of course, arguments about the merits of the absolutely permanent nature of any form of land conservation may seem divorced from reality. No matter how much any present individual actor might want to ensure that a piece of land is preserved forever, no conservation activity taken in the present can absolutely force future generations to defer to a present preference for conservation. All that an individual or a collective can do in the present is to increase the cost and difficulty of future development, whether through constitutional protections, statutory or regulatory ac-

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<sup>97</sup> Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in PROTECTING THE LAND, *supra* note 25, at 26, 45.

<sup>98</sup> John D. Echeverria, *Regulating Versus Paying To Achieve Conservation Purposes*, SJ053 A.L.I.-A.B.A. 1141, 1159 (2004).

<sup>99</sup> *Id.* at 1165.

<sup>100</sup> Mahoney, *supra* note 14, at 783.

<sup>101</sup> Echeverria, *supra* note 98, at 1159.

<sup>102</sup> *Id.*

tion, or individual private actors such as land trusts working through fee acquisitions and conservation easements.<sup>103</sup> This limitation, of course, is known to most thoughtful critics of current practice. Indeed, it is precisely their point: “[t]he permanence of conservation easements is a false goal, because it’s simply not possible — in a physical sense, in a legal sense, in a sociological sense — that today’s easements are going to endure.”<sup>104</sup> Over time, land use, social policies, and development pressures all change and in the face of these changes “legal and political mechanisms are going to evolve to change easements.”<sup>105</sup> Put another way, although conservation easements, like alternatives such as regulatory protection or fee ownership of conservation lands, might also be undone by future generations,<sup>106</sup> the rapid growth and relative novelty of conservation easements mean that the comparable procedures and costs for such potential future modifications are much less well known.<sup>107</sup>

This means that the problem of permanence or the problem of the future identified by critics of current conservation easement practice largely boils down to a few related questions. First, will conservation easements impose greater or lesser costs on future generations who seek to undo them than comparable alternatives? Second, are land trusts, easement donees, and public review boards who choose to protect land through conservation easements aware of these future costs, and are they working to minimize them? Third, how clear are the present and future benefits that conservation easements seek to provide, as measured against these potentially uncertain costs? The first of these questions is addressed in the section immediately below, while the second and third are addressed in the context of the survey in Part III below.

## 2. *Future Costs, Modifications, and Potential Alternatives*

In choosing to protect land, whether by easement or by fee purchase, regulation, statute, or constitutional protections, present actors are balancing their conservation desires, the relative cost of carrying out alternative con-

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<sup>103</sup> Barton H. Thompson, Jr., *The Trouble with Time: Influencing the Conservation Choices of Future Generations*, 44 NAT. RESOURCES J. 601, 607–08 (2004) (pointing out that “[w]e can make land worthless for future development by, for example, irradiating it,” but that “the only way to avoid future development entirely is to damage the land to such a degree that the land is not worth using, and that would thwart preservation as effectively as it would preclude development”).

<sup>104</sup> PIDOT, *supra* note 25, at 22 (quoting John Echeverria).

<sup>105</sup> *Id.*

<sup>106</sup> See Thompson, *supra* note 103, at 608–09 (discussing the relative ease of terminating various conservation alternatives, and suggesting that “[f]reeing land from a perpetual conservation easement, although difficult,” may actually “be far easier to accomplish” than terminating some conservation alternatives, such as “changing a constitutional conservancy or public park”).

<sup>107</sup> Of course, although the extent of the future costs of undoing facially permanent donated conservation easements may be unknown, even defenders of conservation easements acknowledge that the costs of undoing such easements will likely be uniquely high. See, e.g., Tapick, *supra* note 94, at 263.

servation methods in the present, and the expected cost barrier that various conservation protections might impose on future actors seeking to overturn them. Critics of current easement practice suggest that an additional cost should be, but is not, sufficiently considered: namely, the potential cost that present conservation actions might impose on the legitimate conservation aims of future generations, who might be limited in their choice of conservation options by permanent restrictions, or who might find that conservation easements protect land that is no longer valuable for conservation purposes due to changing conditions.<sup>108</sup> To some extent, this may be a problem that affects any present choice for future conservation — whether statutory, regulatory, or otherwise — but it is a problem of particular importance for conservation easements because of their facial commitment to a strict permanence.

In addition, conservation easements are so novel that it is hard to know how future actors might attempt to undo them, much less whether they will fail or succeed in their attempts. One possible alternative might be merger: in most states, “[t]he land trust itself can eliminate the conservation easement . . . by transferring it to the holder of the underlying fee interest and thus ‘merging’ the interests” and eliminating the easement’s conservation restrictions, although doing so might risk “monetary sanctions and even loss of tax-exempt status” under present law if the merger is found to confer private benefits on the fee owner.<sup>109</sup> Another alternative might be amendment: in some cases, land trusts can and already do amend or release “conservation easements for equivalent value where the land trust believes that the amendment or release will increase or enhance public benefits.”<sup>110</sup>

Owners of the underlying fee interest may also be able to modify or extinguish conservation easements in the future through legal action even without the cooperation of the easement-holding land trust. For example, a future landowner might be able to extinguish an easement in court by arguing that “changed circumstances make the purposes of the easement impossible or impracticable to accomplish.”<sup>111</sup> A landowner might also argue that

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<sup>108</sup> See Echeverria, *supra* note 98, at 1160 (noting that “[a]s decades and perhaps centuries pass, memory of the original motivations of the negotiators will often become lost and the physical and economic conditions of the property and surrounding area will change” and also that “[t]he specific terms of different easements vary widely and the documents establishing these terms are not now widely accessible”); Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573, 584–87 (2004) (discussing a variety of factors that make predicting future needs and preferences uncertain, and therefore facially permanent conservation choices unwise); Susan F. French, *Perpetual Trusts, Conservation Easements, and the Problem of the Future*, 27 CARDOZO L. REV. 2523, 2529 (2006) (pointing out that “[c]onservation uses and purposes and methods of conservation directed in servitudes created today may become obsolete”).

<sup>109</sup> Thompson, *supra* note 103, at 609.

<sup>110</sup> *Id.*; see also McLaughlin, *supra* note 14 (exploring the possibility of easement amendments through a real-world example).

<sup>111</sup> Thompson, *supra* note 103, at 610. Nancy McLaughlin also notes that:

If, due to changed conditions, the continued protection of the encumbered land for the conservation purposes specified in the easement deed becomes “impossible or



the easement is too vague, ambiguous, or impossible to enforce, that the social value of developing the property has become sufficiently great that the easement holder is entitled only to money damages under the relative hardship doctrine, or that the easement should be vacated “based on the general policies against enforcing servitudes that violate public policy and against permitting the ‘dead hand’ of one generation to control the land use decisions of future generations.”<sup>112</sup>

Furthermore, when a conservation easement is no longer useful, either because of changed conditions or for some other reason, it “might legally die of neglect.”<sup>113</sup> This could happen in at least two ways: first, through a failure to formally re-record the conservation easement under a particular state’s marketable title acts;<sup>114</sup> or second, through estoppel after repeated and successful violations of the easement’s restrictions by the owner of the underlying fee interest.<sup>115</sup> Finally, government might intervene to acquire both the underlying fee interest and the conservation easement through eminent domain or some other similar process in order to convert the protected land to some other future use, thereby extinguishing it.<sup>116</sup>

These alternatives have caused some commentators to suggest that critics of current conservation practice paint an overly dire picture of conservation easements’ lock-in problems. Some of these “more sanguine” commentators suggest that “freeing land from a perpetual conservation easement, although difficult, may be far easier to accomplish” than alternatives

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impracticable,” a court should apply the doctrine of *cy pres* to restore the appropriate balance between the landowner’s desire to exercise dead hand control and society’s interest in ensuring that assets perpetually devoted to charitable purposes continue to provide benefits to the public.

Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 430 (2005).

<sup>112</sup> Thompson, *supra* note 103, at 610–11. As Thompson notes, the Uniform Conservation Easement Act “explicitly provides that courts retain the power ‘to modify or terminate a conservation easement in accordance with the principles of law and equity’.” *Id.* at 609–10 (quoting UNIF. CONSERVATION EASEMENT ACT § 3(b) (amended 2007), 12 U.L.A. 184 (2008)).

<sup>113</sup> *Id.* at 611.

<sup>114</sup> *Id.* But see Jennifer Cohoon McStotts, *In Perpetuity or for Forty Years, Whichever Is Less: The Effect of Marketable Record Title Acts on Conservation and Preservation Easements*, 27 J. LAND RESOURCES & ENVTL. L. 41, 57–58 (2007) (arguing that there is an “underlying conflict” between the “divergent purposes” of conservation easements and marketable record title acts which should be resolved by legislative and regulatory reform produced by lobbying efforts from conservation advocates).

<sup>115</sup> Thompson, *supra* note 103, at 611. Of course, the possibility of extinguishment by estoppel underscores the importance for easement-holding land trusts to regularly monitor the land their easements usefully protect.

<sup>116</sup> *E.g.*, C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25, 43 & n.89 (2008) (citing James W. Ely, Jr. & Jon W. Bruce, *THE LAW OF EASEMENTS AND INTERESTS IN LAND* § 10.42 (2007) and noting that “[a] privately held easement may be terminated directly by an exercise of eminent domain” and that “[i]n addition, if the parcel servient to an easement is condemned the easement over that parcel will also terminate”); see also Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897 (2008) (discussing how conservation easements can and should be condemned, if necessary, and how just compensation for the condemnation should be apportioned between the fee holder and the easement holder).

such as “changing a constitutional conservancy or public park.”<sup>117</sup> Others suggest specific methods through which some conservation easements might be extinguished, at least in rare cases “when an easement fails to meet a generally agreed-upon, threshold test of public benefit,” in a relatively straightforward manner which preserves the donor’s charitable conservation purpose while allowing future generations flexibility of action.<sup>118</sup> A few commentators go even further, suggesting that current conservation easement practice may be justified regardless of the uncertainty surrounding potential modification or termination, because in the event that their stated public benefit is no longer practical, conservation easements will still likely prove to be more reversible than the commercial, industrial, or residential development that would otherwise take place on easement-protected land.<sup>119</sup> Still others suggest that conservation easement holders have the common law right of other easement holders to modify or even “to ‘release’ the easement back to the owner of the servient parcel,” and that even the cy pres remedy suggested by some<sup>120</sup> is likely to prove unnecessary to modify or extinguish easements that no longer meet the conservation purposes for which they were intended.<sup>121</sup>

In short, while many commentators agree that conservation easements are likely to prove relatively flexible in the face of legitimate future conservation preferences, there is very little agreement among these commentators about *how* this future flexibility will be achieved, and more empirical work should be done to focus the present debate in a more constructive direction. In the survey presented in Part III below, I examine how contemporary conservation easement practice in Massachusetts may be increasing or decreasing the potential costs of some alternatives for future easement amendment or extinguishment, including merger and condemnation, as well as the relative clarity of the facial benefits contemporary easements purport to provide. But the potential flexibility of facially permanent conservation easements, or

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<sup>117</sup> Thompson, *supra* note 103, at 609, 618.

<sup>118</sup> McLaughlin, *supra* note 111, at 519–21 (discussing the possibility of amending or extinguishing some easements in the future through application of the doctrine of cy pres). The doctrine of cy pres is an “equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor’s intention as possible, so that the gift does not fail.” BLACK’S LAW DICTIONARY 444 (9th ed. 2009).

<sup>119</sup> Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORDHAM ENVTL. L. REV. 273, 279 (2007); see also James L. Olmsted, *Representing Nonconcurrent Generations: The Problem of Now*, 23 J. ENVTL. L. & LITIG. 451, 469–70 (2008) (claiming that Julia Mahoney’s criticism of conservation easements is unpersuasive because “[i]f future generations no longer want land preserved by conservation easements, they will certainly find the legal and political means to remove [the easements],” but that undoing development and restoring land to its natural condition is impossible because “the land is forever changed”).

<sup>120</sup> See, e.g., *supra* note 111 and accompanying text.

<sup>121</sup> Lindstrom, *supra* note 116, at 44. But see Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1, 4 (2009) (criticizing Lindstrom’s implicit assertion that “land trusts have the right to modify and terminate the perpetual conservation easements they hold ‘on their own’ and as they ‘see fit’”).

the lack thereof, should also be assessed against some very similar conservation alternatives available to land trusts, such as holding land in fee or holding conservation easements designed to be non-permanent or amendable.

While acquisition of land for conservation purposes through fee ownership may result in less total protected land in the present, it may well also result in greater flexibility in the future when compared to land protected by a facially permanent easement. For obvious reasons, land held in fee by a land trust is typically much more difficult to acquire, from a conservation organization's perspective, than a facially permanent easement donated by a landowner in exchange for a tax deduction. When such land is donated outright to the land trust, the landowner must be willing to part with it entirely, and when such land is sold to the trust, the land trust must pay or find another donor to do so. Once a land trust holds such land in fee, its use of the land or ability to sell to any buyer may be constrained by the terms of the sale or donation, or by the nature of the land trust itself.

But however onerous these restrictions on use or alienability for fee-held land may be, fee ownership is still likely to prove more flexible in the future than easement protection. Obviously, modification or alienation of fee-held land will almost certainly be less costly than extinguishment of an easement that begins with the merger of the easement and the underlying land interest, because there will be no need for a transaction and associated costs to first merge split land interests. Beyond these potential merger costs, fee ownership might also prove more flexible with respect to future legitimate conservation goals that may require changes in land use. For example, a land trust may well be able to carry out more carbon sequestration through afforestation on protected land held in fee than on land protected subject to an easement and held by an underlying landowner with various continuing use, exclusion, and access rights.<sup>122</sup>

Another alternative to facially permanent easements would be non-permanent or amendable easements. The potential flexibility of the facially permanent easements encouraged by the present federal tax deduction may be usefully compared to the possibility of easements set to expire at the end of a designated term. Today, such easements are relatively rare. However, if the federal deduction were amended to permit, encourage, or even to require easements donated for a definite term of years, then it is possible — though by no means certain — that land trusts would be able to acquire and protect land at rates similar to the present. It is, of course, uncertain whether tax incentives for term easements similar to the tax incentives presently offered for permanent easements would encourage land owners to donate, and land trusts to acquire, term easements at the same rate that they donate and acquire permanent easements today. On the one hand, some landowners might continue to donate facially permanent easements even if term easements are an option, or they might eschew easement donation altogether if facial per-

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<sup>122</sup> See *supra* note 96 and accompanying text.

manence is not an option.<sup>123</sup> On the other hand, the significance of the development of the federal deduction to contemporary easement practice suggests that relatively minor changes in the tax code might cause term easements to supplement or even supplant facially permanent conservation easements as an option for land trusts and landowners in the future.

Term easements, therefore, might represent a more direct conservation alternative for private land trusts than fee acquisition of protected land, and might also prove more flexible than facially permanent easements. For example, a future landowner frustrated by the facial restrictions of an easement that is no longer monitored or enforced by a particular land trust, or that becomes obsolete due to changes in surrounding land conditions, could count on the restrictions' expiration at a definite future date, and might avoid the legal costs associated with proving estoppel or changed conditions. Beyond the comparison with extinguishment by estoppel or the *cy pres* doctrine, however, term easements also might prove more flexible with respect to future legitimate conservation goals that may require changes in the type of protected land. For example, a land trust may find it easier to acquire shifting conservation easements to protect species habitats if those easements are set to simply expire at certain definite future dates.<sup>124</sup> Some may object to a greater role for term easements on the grounds that these easements are inherently difficult to value, and thus more likely to be abused. But over-valuation issues are no greater than, and may be less than, the valuation issues associated with facially permanent easements under current practice, as discussed below.

### *B. Criticism of Current Conservation Easement Practice*

Beyond criticism related to facial permanence and long-term potential costs, concerns have been raised about whether conservation easements provide sufficient benefits to justify the significant tax revenue foregone when they are created. As discussed above, the long-term costs and benefits of conservation easements are less than perfectly clear, creating reasonable grounds for skepticism about their long-term social utility compared with other conservation alternatives. But the foreseeable aggregate costs and benefits of conservation easements in the present and near future are also unclear, and may be almost as difficult to estimate. Whatever the true extent of these costs, they are likely significant: a recent estimate puts the appraised value of all claimed donations based on conservation easements nationwide at \$20.7 billion for the 2001 to 2003 period alone, and puts the amount

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<sup>123</sup> While many landowners might be equally or perhaps even more motivated to donate an easement that would encumber the land only for a period of years, it is possible that such term easements might discourage easement donations from landowners who genuinely desire to protect their land in its current condition in perpetuity. Cf. Jay, *supra* note 58, at 455 (noting that "[l]andowners genuinely may be motivated to protect . . . [and] preserv[e] their land in its present state for perpetuity").

<sup>124</sup> See *supra* note 95 and accompanying text.

foregone by federal and state treasuries from the deductions taken on these donated easements over the same period in a wide range from at least \$5.2 billion to \$18.2 billion.<sup>125</sup> In addition to the immediate public cost of deductions, landowners may also have property burdened by conservation easements reassessed at the local level for tax purposes, resulting in substantial additional tax benefits to landowners and substantial additional public cost.<sup>126</sup>

Moreover, contemporary easements have also been criticized in the popular and academic literature as the result of a series of well-publicized scandals and broader concerns about potentially over-valued easements and related deductions. While the problem of potentially fraudulent easement donations and deductions may be a limited one, the concerns raised by these scandals may have corrosive effects on contemporary practice beyond the immediate actors involved. The best-known of these incidents, which began to attract national press attention in late 2003, involved The Nature Conservancy, one of the largest private holders of conservation easements, which now protects more than two million acres of land through conservation easements.<sup>127</sup> These scandals involved insider dealing by members of The Nature Conservancy's national board of directors, the use of easement-burdened land for activity of low or non-existent environmental value, and mammoth tax deductions for easement donations of questionable public value.<sup>128</sup> Although the problems at The Nature Conservancy, detailed in *The Washington*

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<sup>125</sup> Dominic P. Parker, *Conservation Easements: A Closer Look at Federal Tax Policy*, in PERC POLICY SERIES, at 10–11 (Prop. & Env't. Research Ctr., PERC Policy Series No. PS-34, 2005), available at <http://www.perc.org/pdf/ps34.pdf>.

<sup>126</sup> See, e.g., TOWN OF BROOKLINE, BROOKLINE CONSERVATION RESTRICTION POLICY 2 (2008), available at [http://www.brooklinema.gov/index.php?option=com\\_content&view=article&id=719&Itemid=1049](http://www.brooklinema.gov/index.php?option=com_content&view=article&id=719&Itemid=1049) (stating that “the assessed value of a parcel encumbered by a Conservation Restriction in perpetuity, which does not permit public access to the property, will be 25% of the parcel's unencumbered fair market value,” and that the value of such a parcel encumbered by a restriction which *does* permit public access “will be 5% of the parcel's unencumbered fair market value”).

<sup>127</sup> See, e.g., THE NATURE CONSERVANCY, CONSERVATION EASEMENTS AT THE NATURE CONSERVANCY, <http://www.nature.org/aboutus/howwework/conservationmethods/private-lands/conservationeasements/about/tncand easements.html> (last visited Dec. 30, 2009) (on file with the Harvard Law School Library) (noting that “[o]f the 15.4 million acres protected by the Conservancy in the United States, more than 2 million acres have been protected through conservation easements granted to the Conservancy”).

<sup>128</sup> See Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss; Buyers Gain Tax Breaks with Few Curbs on Land Use*, WASH. POST, May 6, 2003, at A1 (describing how under the organization's conservation buyer program, expensive properties were purchased by the Conservancy, subjected to easements, appraised at a fraction of their previous value, and ultimately sold to Conservancy trustees); see also David B. Ottaway & Joe Stephens, *Landing a Big One: Preservation, Private Development*, WASH. POST, May 6, 2003, at A9; Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation; Donors Reap Tax Incentive by Giving to Land Trusts, but Critics Fear Abuse of System*, WASH. POST, Dec. 21, 2003, at A1; Joe Stephens & David B. Ottaway, *IRS to Audit Nature Conservancy from Inside*, WASH. POST, Jan. 17, 2004, at A1; Joe Stephens, *Panel Advises Ending Tax Breaks for Easements*, WASH. POST, Jan. 28, 2005, at A12.

*Post*, are probably the best known of the past decade to attract national attention, similar stories have been well publicized at the regional level as well.<sup>129</sup>

Public concern and increased IRS attention to these problems spurred the first potential checks on conservation easement practice and expansion in decades. As discussed above, easement and land trust advocates appear to have beaten back these challenges while expanding the scope of the federal tax deduction, at least temporarily. But this success may be short-lived, particularly if similar scandals emerge in the future, because they amplify underlying concerns about the potential distributional inequity of conservation easements even in cases where outright fraud does not exist. As some critics of current conservation easement practice have pointed out, “[b]ecause most of the owners of land burdened by conservation easements are affluent, or even rich, the prospect of such a giveaway [through the federal tax deduction] raises serious distributional concerns.”<sup>130</sup> While these distributional and public relations concerns are significant, the problem of fraud itself — over-valued easement deductions, fraudulent appraisals, and easements with virtually non-existent public benefits — poses a more direct threat to the justification for conservation easements. As discussed above, the future costs and benefits of conservation easements are less than perfectly clear, creating reasonable grounds for skepticism about their long-term social utility compared with other conservation alternatives.

Conservation easements, in other words, are not cheap, and the foregone government revenue attributable to fraudulent conservation easement donations might well be a huge amount of money, even if it is only a small percentage of the total amount of foregone revenue attributable to all conservation easement donations. Regardless of whether the amount wasted on over-valued or potentially fraudulent easements is substantial enough to make conservation easements a generally less desirable conservation choice than alternatives such as regulation, legislation, or private fee ownership, it is clear that the existence of tax scams involving conservation easements is a significant problem that will not be “readily remedied.”<sup>131</sup> But the problem of fraudulent or over-valued easements may be most significant in terms of its potentially harmful effects on even “good” easements and land trusts. The well-publicized specter of scandal arising out of fraudulent tax deductions based on over-valued or empty conservation easements might have

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<sup>129</sup> See, e.g., Jerd Smith, *Landowners Aim to Reclaim Losses in Easement Scandal*, ROCKY MOUNTAIN NEWS, Aug. 11, 2008, available at <http://www.rockymountainnews.com/news/2008/aug/11/landowners-aim-to-reclaim-losses-in-easement> (“Hundreds of landowners caught up in the state’s conservation easement scandal are joining forces . . . . [I]n the eight years since the program took effect, dozens of instances of suspected fraud and abuse have been uncovered.”).

<sup>130</sup> Mahoney, *supra* note 14, at 779.

<sup>131</sup> PIDOT, *supra* note 25, at 27 (quoting Robert Ellickson). An equally significant area of potential waste, however, arises from conservation easements that are not simply tax scams, but that nonetheless are overvalued because they are donated to land trusts that lack the ability to enforce and defend the easement’s restrictions. *Id.* at 18 (“Even the best written easements are only as good as the holder’s resolve and capacity to monitor, enforce and defend them.”).

corrosive effects even on “good” or honest private land trusts that do not engage in tax scams. For example, to avoid even the appearance of impropriety, “good” trusts have an incentive to maximize the facial permanence of the easements they hold, even if by doing so they exacerbate the problem of permanence discussed above.

### C. Prescriptions for Reform

In light of the concerns about current conservation easement practice raised in the popular press, by legislators and regulators, and in recent legal scholarship, even proponents of conservation easements have criticized aspects of current conservation easement practice as misguided, inequitable, inefficient, or counter-productive. Several commentators and practitioners have offered suggestions for reform.<sup>132</sup> Some of the most succinct revolve around perceived abuses related to the federal tax deduction through the overvaluation of easements and inappropriate tax deductions.<sup>133</sup>

Others criticize the federal deduction at a more fundamental level, arguing that funding conservation easements through donations and deductions inherently leads to inefficiencies because “tax financing gives [local land trusts] incentives to accept conservation easements whenever the benefits to locals outweigh the costs to locals — even if the costs to distant and dispersed taxpayers are high and their benefits low.”<sup>134</sup> One solution to this perceived problem of “disconnect” is amending the tax law or increasing regulatory scrutiny to require that conservation easements encumber only land with more significant ecological benefits — for example, by ensuring that easements do more than “merely provide scenic views for locals.”<sup>135</sup> Another solution would be to replace the current tax-deduction funding system for conservation easements held by private land trusts with a system of federal matching grants, which would require local trusts to raise matching funds from private sources and local governments before providing them with an easement-funding grant.<sup>136</sup>

Beyond this disconnect, many other commentators criticizing the federal deduction focus on the distorting effects of its requirement of facial perpetuity.<sup>137</sup> Some of these commentators believe that facial permanence should continue to be the default duration — although with allowances for

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<sup>132</sup> See, e.g., *id.*; Small, *supra* note 25.

<sup>133</sup> For example, a leading commentator and practitioner claims that the most significant cause for “a ‘bad’ conservation easement transaction is . . . a huge and totally unjustified income tax deduction,” which in turn, is largely reducible to either of two causes: first, an easement that is created without protecting any “significant conservation values,” or second, an appraisal supporting the deduction that is “out of step with reality.” Small, *supra* note 25, at 218.

<sup>134</sup> Parker, *supra* note 125, at 16.

<sup>135</sup> *Id.* at 15–16.

<sup>136</sup> *Id.* at 20.

<sup>137</sup> See, e.g., Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L.Q.* 673, 705–06 (2007). McLaughlin notes that:

more frequent judicial modification or termination through application of the cy pres doctrine. Others claim that purchased, alienable, and term easements should be the norm because they allow land trusts to be more flexible, particularly when it comes to providing significant public benefits such as public access and protection of contiguous parcels of land.<sup>138</sup> For example, one commentator claims that land trusts that rely “exclusively on easement donations are less likely to provide trails than trusts with a budget for purchasing land,” and that the “IRS requirement of perpetuity is the main reason why it is hard for trusts to conserve contiguous parcels through donated easements.”<sup>139</sup> Of course, absent a revision of the federal tax regime to eliminate the facial permanence requirement, any efforts to conserve land through non-permanent easements would have to proceed without the benefit of federal tax subsidies, and it is an open question, at best, whether land trusts would be able to acquire substantial easement holdings by purchase or donation without tax deductions.

Perhaps the most thorough recent proposal for conservation easement reform has been advanced by Jeff Pidot, the longtime chief of the Natural Resources Division of the Maine Attorney General’s Office. According to Pidot, current conservation easement practice is “an urgent concern” because of the “enormous growth in the numbers of easements and land trusts in recent years,” the “imprecision of laws governing conservation easements and their appraisals,” and the dearth of registration, accreditation, transparency, structure, and enforcement at the state level.<sup>140</sup> Pidot believes that reforms are needed to address numerous issues.<sup>141</sup> Throughout his recommendations for reform of current conservation easement practice, Pidot repeatedly endorses the Massachusetts approach to these issues, discussed at greater length below, as a “model,” or as coming “closest to the ideal.”<sup>142</sup> For example, Pidot argues that other states should consider the Massachusetts model for state and local review and approval of conservation ease-

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[T]he type of long-term protection afforded by perpetual conservation easements is not appropriate in all circumstances. For example, consider rural, agricultural land located on the edge of a burgeoning metropolitan area that the local government wishes to protect from development temporarily (to encourage appropriate in-fill development and minimize sprawl), but also foresees will need to be developed in approximately thirty years.

*Id.* at 706.

<sup>138</sup> Because conservation easements are also facially “perpetually non-transferable,” they “cannot be easily extinguished and converted into cash to be reinvested in conservation elsewhere.” Parker, *supra* note 125, at 18.

<sup>139</sup> *Id.*

<sup>140</sup> PIDOT, *supra* note 25, at 7.

<sup>141</sup> These issues include deficiencies and a lack of uniformity in conservation easement terms and design; lack of publicly accessible record-keeping; lack of public transparency, input, and accountability; concerns about the longevity and institutional capacity of easement-holding land trusts; ambiguities about tax standards and appraisals; uncertainty regarding easement termination, enforcement, and amendment; the effects of conservation easements on other public conservation efforts; and issues of distributional fairness and environmental justice. *Id.* at 36.

<sup>142</sup> *Id.* at 12; see also *id.* at 11, 17.



ments as a “starting point” to help ensure greater public transparency of the easement’s stated and actual benefits, to ensure greater uniformity and precision in easement design and language, and to help prevent the scattered “green sprawl” that can result from the ad hoc forces and opportunities that drive easement acquisition in other states.<sup>143</sup>

These proposals for reform and the concerns on which they are based need to be tested and evaluated in light of current practice. Beyond this Article’s survey of Massachusetts practice, there is a need for detailed empirical work from jurisdictions with different conservation easement regimes in order to determine whether current easement practice in those jurisdictions is resolving, exacerbating, or frustrating the reformers’ concerns and suggestions. This Article’s survey of Massachusetts conservation restrictions is a particularly good place to start, both because of Massachusetts’s historic importance in the evolution of privately held conservation easements, and because some reformers have suggested that the Massachusetts public approval and registration system should serve as a model for other jurisdictions.

#### *D. Potential Additional Justifications for Conservation Restrictions*

Two additional potential justifications for privately held conservation easements, neither of which has received much, if any, attention in the present debate, deserve brief consideration before turning to the results of the survey.

##### *1. Potential Increases in Social Capital*

One additional potential justification for privately held conservation easements arises from the social capital provided by the land trusts holding these easements. The growth of private land trusts over the past few years is particularly striking when compared to the lack of growth over the same time period for other local conservation organizations specifically and other sorts of civic organizations more generally. For example, while there is substantial evidence that, in general, *national* environmental organizations have grown very rapidly in the last half-century, the “systematic evidence . . . tends to suggest a decline” in the number of “conservation and environmental organizations at the state and local level” over the last several decades.<sup>144</sup> To the extent that local and regional land trusts provide a counterweight to this alleged decline, the conservation easements that have fueled their growth may be providing a public benefit, at least for anyone concerned about dwindling grassroots enthusiasm for conservation values or the relative weakness of local proponents of conservation relative to pro-develop-

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<sup>143</sup> *Id.* at 10–11, 15.

<sup>144</sup> ROBERT D. PUTNAM, *BOWLING ALONE* 160–161 (2000).

ment interest groups.<sup>145</sup> Furthermore, the social capital created by the easement-fueled growth of local and regional land trusts may be of general value even beyond the conservation context, given both the “mutually reinforcing and habit-forming” nature of any sort of volunteer civic involvement and the overall decline of participation in all types of local community projects in the last half-century.<sup>146</sup> In other words, regardless of their relative efficiency compared to other conservation alternatives, conservation easements may have value because of the potential bridging social capital created by the local and regional land trusts that hold them — at least insofar as these local and regional land trusts are able to provide the members of their communities with opportunities for rewarding civic involvement. Of course, any increase in community involvement and local social capital is unlikely to justify, on its own, the cost to the public fisc of contemporary easement practice. If present easements have little or no conservation value, there are cheaper and distributionally more desirable ways to build social capital than the expenditure of billions in tax deductions to private landowners, at least some of whom are likely to be relatively wealthy. But if conservation easements are capable of providing clear and substantial conservation benefits, then a renewed emphasis on the community involvement that conservation easements and private land trusts can create could also ameliorate some of the concerns about insufficient conservation value or potential lock-in inefficiencies while replenishing dwindling local social capital as a by-product.

For example, increased community involvement in the maintenance and monitoring of easement-protected land could diminish the concern that many easements, despite their facial restrictions and assertions of permanence, will ultimately be voided because of neglect by over-stretched land trusts that are simply unable to effectively perform these tasks.<sup>147</sup> More specifically, under the Massachusetts model discussed below, local government approval of easements could be conditioned upon presence of a monitoring provision, setting forth specific amounts of community time or monitoring tasks to be performed within a set period.<sup>148</sup> An alternative method for local governments under the Massachusetts model to increase community involvement might simply be a renewed emphasis on ensuring public access to easement-protected land for public recreation and education, because steady levels of public access to an easement-protected parcel should decrease the likelihood

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<sup>145</sup> See, e.g., Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 13–14, 29 (2003). Bell and Parchomovsky note that “[a]s a result of the special burdens and costs confronting preservationists, prodevelopment interest groups will often prevail in their effort to push forward inefficient projects,” because the “preservation interest consists of widely scattered stakes, and each of relatively small value, while the development interest is generally unitary, politically savvy, and of relatively large value,” and because “the benefits of development generally find full expression in the political arena, while the political arena does not fully account for the benefits of preservation”. *Id.* at 29.

<sup>146</sup> PUTNAM, *supra* note 144, at 122, 128–29.

<sup>147</sup> See PIDOT, *supra* note 25, at 18–19.

<sup>148</sup> Note that under the current tax regime, such easements would obviously require careful drafting in order to comply with the requirement of facial permanence for the federal deduction.

that such an easement's restrictions will lapse through inadvertent neglect. By requiring more easements to provide express grants of public access, and by conditioning approval for such easements on specific benchmarks or estimates for the amount of public recreation, education, or other meaningful access that such easements will provide, local governments under the Massachusetts model could both increase the potential for social capital generation and address some of the concerns about contemporary easements discussed above. By tying approval of conservation easements to benchmarks of conservation-related community activity, local governments under the Massachusetts model may well increase the present and future conservation value of those easements, minimize the present specter of fraudulent or overvalued easement donations and deductions, and provide additional social benefits beyond the easements' stated conservation goals.

## 2. *Potential Regional Differences and Inter-Local Competition*

A second additional potential justification for conservation easements arises from the beneficial competition between localities and regions that conservation easements may help provide. Beginning with the work of Charles Tiebout, scholars have realized that localities compete for residents through a mixture of taxes, services, and land use controls,<sup>149</sup> including growth limitations such as zoning restrictions, development charges, or even the acquisition of "the development rights of landowners."<sup>150</sup> Given the diverse interests and preferences of property owners, different local property protection schemes and standards arising from this competition can create an increase in overall efficiency as people "tend to sort themselves into communities that share their particular priorities."<sup>151</sup> Because conservation easements are overwhelmingly acquired from the bottom-up, through landowner donation or sale, they may provide communities with an alternative opportunity to demonstrate their commitment to conservation values or to particular land use patterns, in contrast to the top-down imposition of zoning restrictions or development charges. Put another way, local governments that participate in easement review, as in Massachusetts, can vary both their levels of cooperation with private land trusts that seek to acquire conservation easements and their standards for the approval of conservation easements, thereby helping to create potentially beneficial sorting for mobile property owners with varied conservation preferences without resorting to restrictive zoning or development charges. Accordingly, conservation easements may generate public benefit to the extent that they help foster this sort of competition by preserving different types of land.

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<sup>149</sup> See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>150</sup> Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 390-92 (1977); see also Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 900-01 (2007).

<sup>151</sup> Serkin, *supra* note 150, at 899.

## III. SURVEY OF MASSACHUSETTS CONSERVATION EASEMENTS

Despite the disagreement about the merits and future of conservation easements discussed above, too few of the justifications and criticisms in the legal academic literature have been evaluated in the context of the details of current conservation easement practice. In part, this may be attributable to the relatively recent and rapid growth of private land trusts and conservation easements. The dearth of empirical examination of conservation easement practice in the legal academic debate is also attributable to the nature of the debate itself; many of the concerns about the potentially inefficient “lock-in” effects of conservation easements may not be fully realized, or testable, for many years.<sup>152</sup> Finally, the difficulty of interpreting individual conservation easements has posed an obstacle to empirical work in this area. Easements are relatively lengthy and convoluted legal documents even under the best of circumstances, and typically vary from state to state and even from land trust to land trust.<sup>153</sup> Part III of this Article seeks to clear away some of these obstacles and to refocus the current debate by testing and examining the concerns behind academic and popular criticisms of conservation easements, as well as suggestions for reform of current conservation easement practice, against a survey of 113 conservation restrictions held by local and regional land trusts across Massachusetts.

A. *Background*

Massachusetts is the birthplace of conservation easements and private land trusts. Today, it is one of the most hospitable jurisdictions in the country for conservation easements, private conservation generally, and private land trusts in particular.<sup>154</sup> At the same time, Massachusetts has an elaborate, highly formal state approval structure for the creation and amendment of conservation easements. In other words, Massachusetts provides the longest timeline, and some of the most favorable conditions, in practice, for the creation and maintenance of conservation easements — even though the statutory process for acquiring and amending conservation easements is, on its face, relatively onerous. This combination makes Massachusetts an ex-

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<sup>152</sup> Cf. Mahoney, *supra* note 14, at 745 (noting that “[a]ll available evidence . . . indicates that our competence” in predicting “the needs and preferences of future generations” is limited).

<sup>153</sup> See PIDOT, *supra* note 25, at 9 (noting that “[b]y all accounts, conservation easements have become increasingly dense and intricate instruments” and that the “variable quality” and lack of “uniformity even within a particular holder’s easement portfolio” are some of the main concerns about contemporary conservation easement practice raised by recent studies).

<sup>154</sup> Despite its relatively small size, and despite the fact that unlike other states (such as Colorado or Virginia) it does not offer a state tax incentive beyond the federal tax deduction, Massachusetts ranks in the top fifteen of all states for total acres under conservation easement, falls within the top ten of all states for total acres conserved through private means, and is second only to California in total number of land trusts. See LAND TRUST ALLIANCE, *supra* note 2, at 4, 11, 20.

cellent laboratory to test theories on both sides of the contemporary conservation easement debate, even beyond its status as an exemplar of best practices by those who seek to reform contemporary conservation easement practice elsewhere.<sup>155</sup>

For the remainder of this Article, the term “conservation restriction” will be used as defined in the Massachusetts Restriction Statute,<sup>156</sup> which classifies “[a] conservation restriction” as “a right, either in perpetuity or for a specified number of years,” which is “appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, farming or forest use, to permit public recreational use, or to forbid or limit any or all” of a number of specific activities.<sup>157</sup> The idiosyncrasy of Massachusetts’s conservation easement regime begins with the term itself. As mentioned above, the term “conservation easement,” strictly speaking, has no specific meaning in Massachusetts law.<sup>158</sup> Instead, under Massachusetts law, a “conservation restriction, formerly known as a conservation easement, is a means authorized by [state statute] to limit the use of land in order to protect specified conservation values including the natural, scenic or open condition of the land.”<sup>159</sup> Somewhat confusingly, however, Massachusetts also uses the term “conservation restriction” as an umbrella term to include other forms of restrictions as well.<sup>160</sup> While several of these

<sup>155</sup> See PIDOT, *supra* note 25, at 11–12, 17.

<sup>156</sup> MASS. GEN. LAWS ch. 184, § 31 (2008).

<sup>157</sup> *Id.* The statute goes on to mention the following activities which, if limited or forbidden by an instrument, may qualify it for treatment as a conservation restriction:

(a) construction or placing of buildings, roads, signs, billboards or other advertising, utilities or other structures on or above the ground, (b) dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste or unsightly or offensive materials, (c) removal or destruction of trees, shrubs or other vegetation, (d) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such manner as to affect the surface, (e) surface use except for agricultural, farming, forest or outdoor recreational purposes or purposes permitting the land or water area to remain predominantly in its natural condition, (f) activities detrimental to drainage, flood control, water conservation, erosion control or soil conservation, or (g) other acts or uses detrimental to such retention of land or water areas.

*Id.* This list of activities enumerated by the statute to be limited or forbidden by the conservation restriction will be discussed in the survey below as a sort of “boilerplate” baseline for the activities forbidden in practice by Massachusetts conservation restrictions.

<sup>158</sup> See *supra* note 25.

<sup>159</sup> DIV. OF CONSERVATION SERVS., MASS. EXECUTIVE OFFICE OF ENERGY & ENVTL. AFFAIRS, THE MASSACHUSETTS CONSERVATION RESTRICTION HANDBOOK, “Conservation Restriction Defined” section (2008), available at <http://www.mass.gov/Eoeea/docs/eea/dcs/crhandbook08.pdf>. Under Massachusetts law, “[c]onservation restrictions differ from other kinds of specified restrictions,” such as preservation restrictions, watershed restrictions, agricultural preservation restrictions, and affordable housing restrictions. *Id.*

<sup>160</sup> See, e.g., *id.* (noting that “there are five categories of conservation restrictions,” including “the conventional conservation restriction which is perpetual and for the charitable gift of which the donor-landowner may be seeking a charitable deduction for federal income tax, gift and estate tax purposes,” as well as the “historic preservation, watershed or agricultural preservation restrictions”). The Handbook notes that these historic, watershed, or agricultural preservation restrictions differ from conservation restrictions *qua* conservation restrictions (as

other types of restrictions might qualify as conservation easements, at least as that term has been defined and used generally elsewhere in this Article, none is included in the survey below — only conservation restrictions *qua* conservation restrictions.

Beyond this idiosyncratic terminology, the Massachusetts experience with conservation easements is also noteworthy for its relative success. Based on the language of its restriction-enabling statutes, Massachusetts would seem to be a particularly challenging venue for privately held conservation easements, yet in fact its land trust network and its total amount of privately held conservation easements are larger than those found in most states. More specifically, the Massachusetts Restriction Statute requires every conservation, agricultural, historical, or housing restriction to be approved and certified by the relevant arm of state government,<sup>161</sup> and then, if the restriction is to be held privately, by the local municipality.<sup>162</sup> Many states have only a recording requirement for conservation easements, few require any formal state approval process for privately held conservation easements, and none, so far as the author is aware, has an approval process as elaborate or searching as the Massachusetts process. Even considering that the state and municipal agencies involved have become accustomed to the system, on its face this seems to be a relatively cumbersome process. Yet Massachusetts is also a relatively easement-rich state and one of the most land trust-rich states in the nation, and “[t]he Massachusetts model” is one which “receives high marks from the land trust community” because, despite its transaction costs, it helps to ensure the public benefit of each

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noted above), as well as perpetual conservation restrictions required by government agencies in some situations pursuant to Massachusetts density laws and for which no tax deduction is available, as well as development rights restrictions acquired by purchase, as well as term restrictions. *Id.*

These additional specific restrictions are also defined separately in the restriction-enabling statute. See MASS. GEN. LAWS ch. 184, § 31 (2008) (defining preservation restrictions, agricultural preservation restrictions, watershed preservation restrictions, and affordable housing restrictions after and in addition to conservation restrictions). As will be seen below, the statutory approval process for such privately held restrictions involves different authorities as well. Again, this Article’s survey includes only “straight” or “conventional” conservation restrictions, and excludes a handful of agricultural preservation and other restrictions held by the surveyed land trusts that may fall under the broader catch-all use of the term but are not included in its most specific definition.

<sup>161</sup> For example, the statute requires approval by:

[T]he secretary of environmental affairs if a conservation restriction, the commissioner of the metropolitan district commission if a watershed preservation restriction, the commissioner of food and agriculture if an agricultural preservation restriction, the Massachusetts historical commission if a preservation restriction, or the director of housing and community development if an affordable housing restriction.

*Id.* § 32.

<sup>162</sup> *Id.* A similar series of layered approval is required to release such restrictions, in whole or in part, if circumstances arise by which the restriction may be terminated according to its terms. *Id.*

easement on an individualized basis, achieve a measure of public transparency, and insulate easements from subsequent IRS scrutiny.<sup>163</sup>

In short, the Massachusetts public review and approval system has been cited as a model by advocates of easement and land trust reform which other states should strive to emulate as much as possible.<sup>164</sup> Because the Massachusetts public review and approval system serves, in many ways, as a model of best practices for those concerned with reform of current easement practice, reviewing its impact on the stated public benefits of various specific Massachusetts conservation easements offers a way to examine and perhaps test the reformers' case.

### B. *Some Notes on the Survey*

In addition to the reasons stated above, Massachusetts is a particularly good jurisdiction in which to examine and test theories about conservation easements for a very practical reason: the accessibility of its public land records. Massachusetts is divided into twenty-one registry districts, in which documents related to real estate ownership are recorded. Many of these registries have scanned some of their recorded documents and made them available online,<sup>165</sup> and some of these online databases are searchable by document type, document holder, and by town. The survey below is based on information taken from 113 Massachusetts conservation easements,<sup>166</sup> which were created from 1980 to 2008,<sup>167</sup> and which cover land located across the state and recorded online in ten of the most accessible

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<sup>163</sup> PIDOT, *supra* note 25, at 17.

<sup>164</sup> See *id.* (stating that "the Massachusetts model . . . best suits" the need to ensure transparency in the easement approval process and public scrutiny of the purported public benefits of conservation easements, and claiming that "[i]n states where the Massachusetts model is not viable, more informal models" which approximate its ends of "achiev[ing] public transparency and . . . airing of issues concerning public benefits of proposed easements and their locations" should still be used).

<sup>165</sup> See Massachusetts Registry of Deeds portal page, <http://masslandrecords.com> (last visited Dec. 31, 2009). The documents are assigned book and page numbers, which have been recorded for this survey along with other relevant easement data. The date ranges for documents available online vary by registry: for example, the Franklin County Registry is searchable online for records that date back to 1951, whereas the Bristol Fall River District Registry is searchable online only for records dating back to 1983.

<sup>166</sup> For each conservation restriction in the survey, the following details were noted: date of creation, location, size, composition, means of acquisition, stated specific and boilerplate public benefits, whether or not it provides public access, amendment language (if any), dissolution language (if any), stated specific and boilerplate forbidden land uses, stated specific and boilerplate permitted land uses, and monitoring language (if any). All conservation restrictions cited herein, as well as an index of all restrictions included in the survey, are on file with the Harvard Law School Library.

<sup>167</sup> See, e.g., conservation restriction grant to Carlisle Conservation Foundation (recorded Dec. 26, 1980, at Middlesex North District Deeds, bk. 2458, p. 516); conservation restriction grant to Berkshire Natural Resources Council (recorded Dec. 30, 2008, at Berkshire North District Deeds, bk. 1354, p. 1071).

Massachusetts registries.<sup>168</sup> Land covered by the surveyed easements ranges from the Berkshires in the rural western part of Massachusetts, to the exurbs and suburbs of the Boston region, to the island community of Martha's Vineyard with its substantial number of seasonal residents. The types of property covered by surveyed easements are similarly diverse, including forests, meadows, mountains, and wetlands, and the size of the various lots covered by the surveyed easements also varies from less than an acre<sup>169</sup> to easements protecting multiple parcels of land covering several hundred acres.<sup>170</sup>

With few exceptions, the easements represented in this survey are not held by the largest conservation organizations in Massachusetts with statewide holdings, such as the Trustees of Reservations, nor are they held by conservation organizations with an interstate or national focus, such as The Nature Conservancy.<sup>171</sup> Instead, the surveyed easements are held by twenty substantially smaller private local and regional land trusts,<sup>172</sup> which for the purposes of this Article are defined as land trusts with fee or easement holdings that are less than statewide.<sup>173</sup> Accordingly, the easements in this survey may well differ from a comparable set of easements held by larger, statewide or national land trusts. For example, it is possible that the easements in this survey may grant more or less public access than easements held by larger organizations, or may be held on different lot sizes or types of property than those held by larger organizations. To take another example, although many local land trusts may use state or national models to help draft their easements, the relative size and number of trusts involved suggest that the easements reviewed in this survey likely are more varied in their structure, if not their substantive terms, than a set of comparable size held by

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<sup>168</sup> Those ten registries (and the number of survey easements from each) are Berkshire Middle District (5), Berkshire North District (21), Berkshire South District (17), Dukes County (10), Franklin County (7), Hampden County (6), Hampshire County (6), Middlesex North District (17), Middlesex South District (10), and Worcester South District (14).

<sup>169</sup> *E.g.*, conservation restriction grant to Bolton Conservation Trust (recorded July 26, 1999, at Worcester South District Deeds, bk. 21653, p. 67) (granting an easement on a parcel of land of about 22,000 feet).

<sup>170</sup> *E.g.*, conservation restriction grant to Berkshire Natural Resources Council (recorded Feb. 16, 2001, at Berkshire North District Deeds, bk. 1020, p. 798).

<sup>171</sup> However, there are at least three "co-held" exceptions: two of the easements held by the Sheffield Land Trust represented in this survey are held jointly with The Nature Conservancy, and one is held jointly with the Appalachian Trail Conference.

<sup>172</sup> The land trusts holding easements included in this survey (and the number of survey easements held by each) are the Acton Conservation Trust (2), the Alford Land Trust (1), the Belchertown Land Trust (1), the Belmont Land Trust (3), the Berkshire Natural Resources Council (11, and another 6 co-held with other listed trusts), the Bolton Conservation Trust (13), the Carlisle Conservation Foundation (15), the Dunstable Rural Land Trust (2), the Egremont Land Trust (2), the Groton Conservation Trust (5), the Kestrel Trust (3), the Opacum Land Trust (2), the Rattlesnake Gutter Trust (7), the Richmond Land Trust (2), the Sheffield Land Trust (14), the Stockbridge Land Trust (3), the Valley Land Fund (1), the Vineyard Conservation Society (10), the Williamstown Rural Lands Foundation (10), and the Winding River Land Conservancy (6).

<sup>173</sup> Most of the land trusts with easements examined in this survey are listed as member trusts with the Massachusetts Land Trust Coalition. Massachusetts Land Trust Coalition Land Trusts and Conservation Partners, <http://massland.org/?q=land-trusts/list> (last visited Dec. 31, 2009).



state or national land trusts. Of course, more work can and should be done to compare the specific substantive features of conservation easements held by national, state, and local private land trusts in comparable areas.

In sum, this survey offers a dense and varied perspective on many important details of contemporary practice, but it is not comprehensive, even for easements held by local and regional Massachusetts trusts. For example, some Massachusetts registries were excluded from the survey because they lack online databases, or have online databases that are not readily searchable along the lines used here, or cover areas with relatively few local land trusts, or do not record online many of the conservation easements held by their local land trusts. Nevertheless, by providing an unvarnished, balanced compilation of several slices of conservation easements held by land trusts with an intensely local, or at least regional, focus across large and diverse portions of Massachusetts today, this survey provides a novel lens and set of data to examine and test many of the theoretical arguments and popular concerns about current conservation easement practice.

### *C. The Continuing Effects of the Tax Deduction*

Almost all of the surveyed restrictions were acquired by donation rather than purchase, and, as will be seen below, the rate of their creation through 2005 tracks the expansion of the federal deduction and the national rate of increase discussed elsewhere. This survey also reveals that from 2005 to the present the rate of conservation easement creation has continued to accelerate.

#### *1. Date*

As noted above, the various registries surveyed for this Article have different date ranges of material available online. For example, documents recorded from 1951 to the present are available from the Franklin County Registry of Deeds, whereas the Berkshire Middle District online registry only covers documents recorded from 1982 to the present.<sup>174</sup> Given the relatively recent history of most conservation restrictions, however, the date range of online documents provided by all of the registries reviewed in this survey contains almost the entire range of recent federal tax deduction adjustments from 1976 to the present. The date ranges for the conservation restrictions reviewed in this survey, and the average number of restrictions created per year, are provided in Table A and Figure 1.<sup>175</sup>

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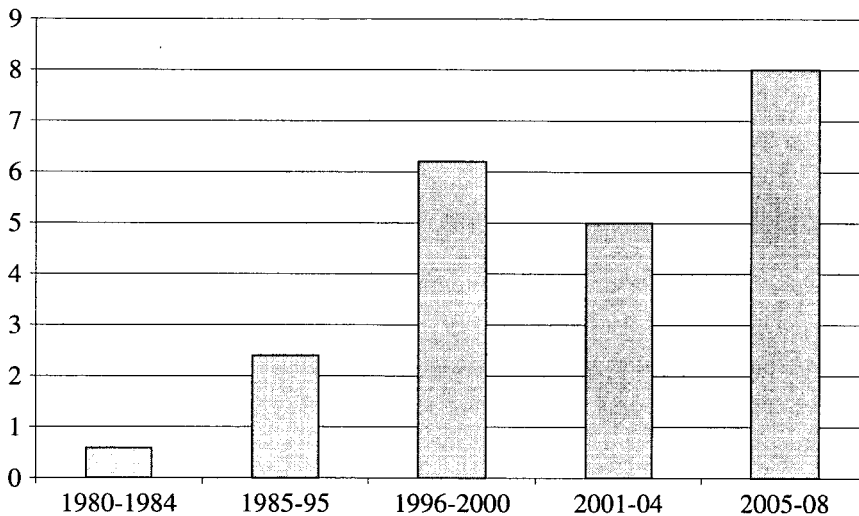
<sup>174</sup> The Massachusetts Registry of Deeds, including a map of all registries, is available online at <http://www.masslandrecords.com/malr/index.htm> (last visited Dec. 31, 2009).

<sup>175</sup> In a few cases, the dates used here differ from the file dates listed online by the various registries for two reasons. First, this survey used the facial dates on which the restrictions were signed by the grantor, rather than the date the restrictions were filed with the registries by the land trust, as a more interesting gauge of the interaction of the various tax adjustment dates with grantor intent. Second, many of the restrictions surveyed were signed at the end of one

TABLE A. CREATION DATES OF SURVEYED RESTRICTIONS

Date Range	Percentage of Surveyed Restrictions
1980–1984	2.7
1985–1995	23.9
1996–2000	27.4
2001–2004	17.7
2005–2008	28.3

FIGURE 1. AVERAGE RESTRICTIONS CREATED PER YEAR



As can be seen from these figures, the date ranges for the restrictions in this survey broadly correspond to national trends. Although Massachusetts has a relatively long history with conservation restrictions, the dates of the easements in the survey roughly correspond to the various expansions of the federal deduction. The survey shows an initial rapid expansion of conservation easements after the availability of the deduction was clarified in the early 1980s followed by additional growth, with some of the most rapid growth of easements occurring since 2005, when the deduction was further expanded.<sup>176</sup> As discussed above, many other factors besides the federal de-

calendar year (perhaps indicating the significance of the tax deduction) but not filed with the registry until several months later.

<sup>176</sup> Most of the land trusts in the survey, regardless of how old they are or when they acquired their first surveyed easement, hold at least one easement created since 2005.

duction may be involved both in individual landowners' decisions to donate easements to land trusts and in the collective patterns of growth and expansion of easements and land trusts over the past few decades. But while the relative novelty of easements and private land trusts may help explain the rapidity of their growth on a national level, it does not apply to Massachusetts, where land trusts and easements have existed since before the turn of the last century. Yet, with respect to the privately held conservation restrictions in Massachusetts included in this survey, the acquisition dates closely parallel both national rates and the relevant dates for the expansion and evolution of the federal tax deduction discussed above.<sup>177</sup>

## 2. Consideration

The overwhelming majority of the restrictions reviewed in this survey were acquired by donation or for nominal consideration. Only five of the 113 restrictions in this survey, or fewer than five percent, were acquired by their land trusts for more than nominal consideration. In four of these cases, the consideration was \$36,000 or less.<sup>178</sup> The fifth of these restrictions is held jointly by a land trust and a local water and sewer commission as tenants in common over a property of more than 250 acres. It was acquired for almost \$140,000 paid by the water and sewer commission to the fee owner and grantor, a nearby town, as part of that grantor's own purchase price for the land at issue.<sup>179</sup> In other words, this particular purchased conservation restriction seems to be an outlier on many levels, not least because it demonstrates the unique flexibility, beyond the usual donation-and-deduction scenario, that conservation easements can offer to public and private actors with overlapping conservation aims and limited budgets. Finally, a sixth conservation restriction in the survey covers land originally held by a

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<sup>177</sup> Of course, as with all of the results of the survey, caution should be used — given the number of easements in this Article's survey, its results should be understood as providing impressions of, rather than conclusions about, current practice.

<sup>178</sup> Conservation restriction grant to Sheffield Land Trust (recorded Nov. 14, 1994, at Berkshire South District Deeds, bk. 913, p. 1) (consideration of \$20,000); conservation restriction grant to Belchertown Land Trust (recorded July 19, 2004, at Hampshire County Deeds, bk. 7907, p. 172) (consideration of \$18,000); conservation restriction grant to Kestrel Trust (recorded June 9, 2006, at Hampshire County Deeds, bk. 8746, p. 280) (consideration of \$36,000); conservation restriction grant to Rattlesnake Gutter Trust (recorded Oct. 20, 1993, at Franklin County Deeds, bk. 2829, p. 159) (consideration of \$1,000). When an easement is purchased for its fair market value, as determined by an appraisal, no charitable contribution has been made and no charitable deduction is available under the federal standard. If, on the other hand, an easement is purchased for less than its appraised fair market value, known as a "bargain purchase" or "bargain sale," the landowner may be entitled to a federal income tax deduction with respect to the portion of the value of the appraisal that was donated. McLaughlin, *supra* note 23, at 455 n.12. The appraised values of these easements are not included in the survey, and therefore, it is impossible to determine whether the donors of these four easements may have taken the bargain sale deduction; however, given the consideration involved, bargain sale tax treatment seems possible for some or all of them.

<sup>179</sup> Conservation restriction grant to Winding River Land Conservancy (recorded May 26, 2006, at Hampden County Deeds, bk. 15928, p. 553).

land trust, but subsequently sold to a landowner for \$75,000, with the land trust then retaining a conservation restriction on the property. While this transaction is unusual, indeed unique, in the scope of this particular survey, it reveals another, under-examined facet of the relationship between the alternatives of fee ownership and easement holding available to land trusts.<sup>180</sup>

#### *D. Potential Public Benefits of Easements in the Survey*

Despite legitimate concerns about fraudulent easement donations used as tax scams, this survey reveals that a substantial majority of surveyed restrictions clearly state at least one specific public benefit for the Massachusetts public review process. Some of these specific public benefits — particularly new grants of public access, found in over a third of all restrictions surveyed — are seen as among the most desirable benefits in recent studies and proposals for reform. This finding suggests that at least some of the surveyed restrictions are providing a real measure of public benefit in exchange for their substantial cost. On the other hand, the survey suggests that variations in some significant public benefits, such as public access, are the results of variations in the skill, priorities, or resources of individual land trusts, and do not necessarily reflect different community or regional norms. The remainder of this section examines provisions in the surveyed easements relating to various possible categories of public benefit, such as public access, contiguity with other protected land, and any lot-specific attributes explicitly listed in the easement, and then discusses how the Massachusetts review process might influence such provisions.

##### *1. Public Access*

Beyond the various specific and often idiosyncratic public benefits discussed below, public access may be one of the most important benefits a conservation easement can provide, and it is probably the most significant benefit relevant to the present debate.<sup>181</sup> Accordingly, some commentators

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<sup>180</sup> Conservation restriction grant to Berkshire Natural Resources Council (recorded Oct. 1, 1996, at Berkshire North District Deeds, bk. 923, p. 393).

<sup>181</sup> In Massachusetts, the importance of public access is expressly recognized by the Massachusetts Division of Conservation Services in its MASSACHUSETTS CONSERVATION RESTRICTION HANDBOOK, which states that although public access is not required, it is “strongly encouraged by the Secretary” and that in the course of the restriction review process, “[p]ublic access . . . may prove to be the only public interest gained from placing land under a conservation restriction — in the Secretary’s opinion.” DIV. OF CONSERVATION SERVS., *supra* note 159, “Public Access” subsec. As will be seen immediately below, the significance of access has been noted in the academic and popular debate as well. Indeed, some have called for the application of the public trust doctrine to force land trusts to open up their holdings to public access, possibly including land protected by easements as well as land held in fee. *See, e.g.,* Sarah C. Smith, Note, *A Public Trust Argument for Public Access to Private Conservation Land*, 52 DUKE L.J. 629, 634–35, 650 (2002) (noting that “[v]ery few states impose a public access requirement” and arguing that states should amend their conservation easement statutes “to require the holder of a conservation easement to allow public access on the land”).

have focused on public access as one of the key advantages that conservation easements can pose over alternative conservation choices.<sup>182</sup> On the other hand, the concerns raised by critics and reformers of current conservation easement practice suggest that public access to land protected by easements is relatively rare, and that relative rarity suggests that most conservation easements may fail to provide real benefits to the public.<sup>183</sup>

The significance of public access in the contemporary debate and in contemporary practice may well be the result of its immediate salience. A grant of access represents a clear surrender by the landowner, and a concomitant grant to the public, of an underlying right whose costs and benefits may be easier to appreciate and value than the simple preservation of open space, scenic views, or species habitats. Moreover, when an easement creates a new right of public access, the respective benefits and costs become clearer, and concerns about over-valued or even fraudulent easements may be diminished, relative to an easement that simply confirms and preserves present patterns of land use. Something like this immediate salience may be at work in the Commonwealth's emphasis on access, and its acknowledgment that access may be the only public interest to be gained from a restriction.

But public access has additional, under-examined features that distinguish it from the other purported benefits. For example, a measure of public access on at least some protected land may well be necessary if land trusts are to meaningfully involve and engage their surrounding communities as more than potential donors of land and passive recipients of conservation goods. In other words, public access, whether for recreation or easement maintenance, is the only purported benefit of conservation easements that can foster the potential increases in community involvement and social capital creation discussed in Part II.D. Furthermore, meaningful public access likely serves as a counter-weight to some of the concerns about contemporary easement practice discussed above. For example, substantial public access to easement-protected land decreases the likelihood that such an easement will fall into immediate desuetude — thereby providing the underlying landowner with an overvalued deduction for her donation — and augments the inherently limited ability of easement-holding land trusts to monitor landowner compliance with the easement's restrictions. In sum,

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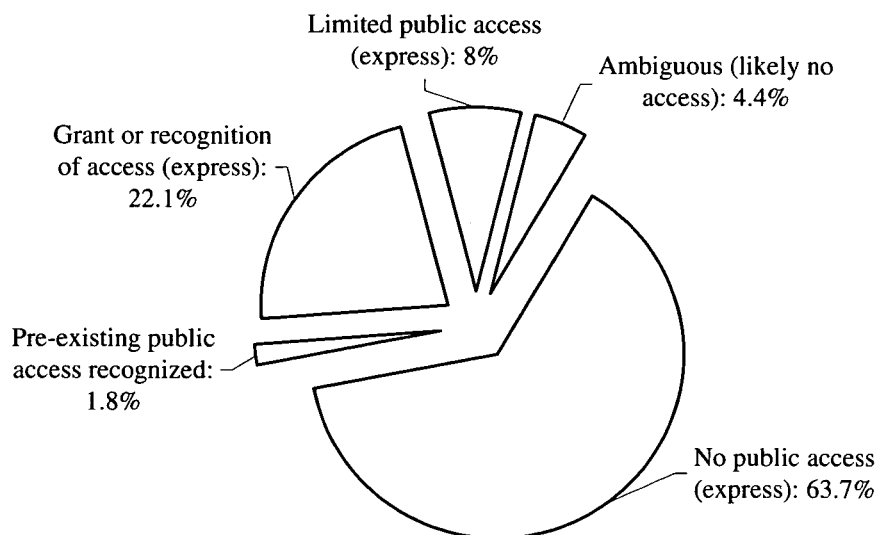
<sup>182</sup> "Because conservation easements can include provisions to allow public access to the resource, which will increase public enjoyment of the resource and help maintain the integrity of the property, the public benefits of a conservation easement may be greater than that which can be achieved through regulation." Vinson, *supra* note 119, at 300.

<sup>183</sup> See, e.g., Nancy D. Holt, *Finding a Big Tax Break in the Backyard*, WALL ST. J., Dec. 26, 1997, at 1 (noting that conservation easements have become "an increasingly popular way for wealthy people to get a tax cut" who, in many cases, "never planned on developing the land anyway" and who often continue to restrict all public access); PIDOT, *supra* note 25, at 14 (noting that "[p]ublic access is often considered an important public benefit associated with conservation easements, but federal tax laws do not require access," and that "[p]ublicly subsidized conservation easements without access for visitors to enjoy the natural values of the property may have little public benefit unless there is some other demonstrable conservation purpose").

public access is perhaps the most significant benefit that conservation easements can provide, not only because of its obvious salience but also for the unique synergy between community involvement and increased conservation value that it can create.

The restrictions reviewed in this survey vary greatly in the amount of public access they grant. Many of the surveyed restrictions expressly disavowed any right of public access. On the other hand, some expressly provided for general public access for at least passive recreation (such as hiking, cross-country skiing, or horseback riding); some provided for limited public access, often under the grantee land trust's supervision, at specified times and for specified purposes (such as guided nature walks); and some did not create any new rights of access, but expressly recognized the public's preexisting access rights. Figure 2 sets forth the relative rights of public access created and recognized by the restrictions reviewed in the survey. In sum, slightly more than a third of the restrictions surveyed statewide grant or recognize some level of public access, but over half expressly disclaim any public right of access. While the overall results show a substantial minority of the surveyed easements grant access, the survey shows no statistically significant correlation with many of the variables that might be expected to influence public access, such as covered lot size or registry location (whether rural or suburban), though this may simply be a result of the sample size and the difficulty of separating and considering these variables in isolation.

FIGURE 2. PUBLIC ACCESS GRANTED BY SURVEYED RESTRICTIONS



Although it is impossible to draw definite conclusions from this limited sample, the most apparent relationship with the variations in public access rights across the surveyed easements may be the identity of the land trust.<sup>184</sup> For example, six of the seven surveyed restrictions held by the Rattlesnake Gutter Trust grant public access; on the other hand, all of the surveyed restrictions held by at least seven land trusts uniformly lack any grant of public access. But this clustering effect may also be attributable to some other cause, particularly given the limited nature of this survey, and more work should be done in the future to determine whether easement grants of public access have a similar relationship with the identity of the easement-holding land trust in other contexts.

In sum, Massachusetts conservation restrictions seem to offer substantial public access on a relatively frequent basis, but such grants of access are far from the norm, as defenders of current easement practice might hope. In other words, this survey suggests that while access rights may be relatively widespread — perhaps more widespread than critics of current practice would predict — many local and regional land trusts can and should do a better job in securing limited rights of public access over at least some of their conservation restrictions, and local governments in Massachusetts could do a better job of encouraging such access rights through the approval process.

## 2. *Specificity of Descriptions and Idiosyncratic Benefits*

The descriptions of the land protected by and of the public benefits provided by the restrictions reviewed in this survey vary greatly. Some of the surveyed restrictions describe the land they purportedly protect in the most general terms; others offer descriptions or statements of purpose that contain precise and minute detail. Furthermore, the restrictions with the most specific statements of purpose or the most specific descriptions of the protected land vary greatly as to what they are specific about. Some of these most specific restrictions identify particular natural or agricultural features of the land, from glacial gorges<sup>185</sup> to “typical Scots-Irish potato field[s]”<sup>186</sup> as examples of the scenic or aesthetic values that the restriction is designed to protect. Others focus on particular species of animals or plants that live on the protected land, and some specifically pick out habitats on the protected land, such as beaver dams or a blue heron rookery, as examples of the wildlife conservation values that the restriction will protect.<sup>187</sup> Still others

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<sup>184</sup> As noted elsewhere, these results should be understood as providing impressions of rather than conclusions about current practice given the limitations of the survey.

<sup>185</sup> See conservation restriction grant to Rattlesnake Gutter Trust (recorded July 10, 2007, at Franklin County Deeds, bk. 5352, p. 8).

<sup>186</sup> Conservation restriction grant to Kestrel Trust (recorded Dec. 12, 2007, at Hampshire County Deeds, bk. 9346, p. 129).

<sup>187</sup> See conservation restriction grant to Dunstable Rural Land Trust (recorded Dec. 30, 1991, at Middlesex North District Deeds, bk. 5752, p. 187).

pick out specific archaeological sites or historical features on the protected land as examples of the preservation values that the restriction is designed to protect.<sup>188</sup> At least one restriction describes the land and the restriction's purpose in spiritual terms: "[t]his Conservation Restriction protects this Sacred land, and the Gods and ancestors thereof, which are undividable and exist as one. The Sacred nature of this land is beyond any material considerations" because "[i]f the land is desecrated or abused, the ancestors and the Gods will leave, leaving the people alone and rudderless."<sup>189</sup> Others provide more prosaic statements of their specific purpose, focusing, for example, on specific benefits that the restriction will provide for local water supplies.<sup>190</sup>

All told, nearly a third (31.5%) of the easements reviewed in this survey contain highly specific statements of purpose or descriptions of the protected lot. This total does not necessarily include restrictions with provisions for public access, nor does it necessarily include restrictions expressly stating that they protect land adjacent to other protected property, both of which are discussed separately in greater detail above and below.<sup>191</sup> These restrictions are not entirely free from boilerplate statements of purpose or descriptions of the protected land; rather, this figure captures only those restrictions, which, in addition to any general or boilerplate language, also convey on their faces (and presumably, to the public reviewing bodies which must approve all Massachusetts restrictions) a very specific sense of the scenic, ecological, historic, agricultural, or other conservation values that they seek to protect.

Of course, the fact that these restrictions contain clear statements of purpose or descriptions of the protected land does not necessarily mean that these restrictions are desirable or efficient. Indeed, the specificity of these purposes and benefits might actually exaggerate or even misrepresent the restriction's overall worth or desirability: the fact that a restriction invokes the habitat of a particular endangered species, the aesthetic qualities of a particular landmark, or the importance of securing local water supplies by preventing development along a particular brook does not necessarily mean that the restriction is worth its cost in foregone revenue or even its present and potential future transaction costs. But this specificity *does* demonstrate

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<sup>188</sup> See, e.g., conservation restriction grant to Bolton Conservation Trust (recorded Dec. 26, 1991, at Worcester South District Deeds, bk. 13853, p. 304) (stating that it is intended to protect, among other natural resources and historic features, the stone walls of the "Old Frye Farm," which dates back to 1750).

<sup>189</sup> Conservation restriction grant to Opacum Land Trust (recorded Dec. 28, 2007, at Worcester South District Deeds, bk. 42243, p. 374).

<sup>190</sup> See conservation restriction grant to Williamstown Rural Lands Foundation (recorded Dec. 31, 1990, at Berkshire North District Deeds, bk. 824, p. 391); conservation restriction grant to Williamstown Rural Lands Foundation (recorded Dec. 31, 1990, at Berkshire North District Deeds, bk. 824, p. 447).

<sup>191</sup> See *supra* Part III.D.1 (discussing public access); *infra* Part III.D.3 (discussing contiguity). As will be discussed in Part III.D.4, about thirteen percent of all restrictions in the survey include these most specific descriptions and statements of purpose, but do not also include provisions for public access or expressly state that they protect land adjacent to other protected property.



that the conservation benefits these restrictions claim to provide were clearly presented to the public authorities whose review is required for restriction approval under Massachusetts law, and this clarity of purported *benefits*, at least, may compare favorably to the clarity of purported benefits associated with conservation alternatives like regulation or legislation.

### 3. *Contiguity with Other Protected Land*

As noted above, one criticism aimed at conservation easements held by local and regional land trusts is that they are likely to produce a patchwork of relatively small, non-contiguous protected lots, with fewer ecological or aesthetic benefits than larger blocks of protected land, such as parks or wildlife preserves, assembled by other means.<sup>192</sup> Interestingly, many of the restrictions reviewed in this survey expressly state that part of the public benefit they ostensibly provide is the result of their proximity or contiguity with other protected land. More specifically, over twenty-five percent of the restrictions reviewed specifically stated that their protected lots were adjacent to other protected land — whether it was a municipal park, state preserve, land owned outright by a private conservation organization, or another lot similarly burdened by a conservation restriction.<sup>193</sup> This twenty-five percent figure for contiguity should be taken as a floor, not a ceiling, for at least two reasons. First, many more surveyed restrictions not included in this figure specifically stated that their protected lots were “near” or in relative “proximity” to other protected land. Second, some additional surveyed restrictions may in fact cover lots contiguous to other protected land without expressly recognizing this potential public benefit. At a minimum, this survey indicates that at least in Massachusetts, contiguity of restriction-protected lots with other protected lands may be more frequent than some critics of current conservation easement practice would otherwise believe. More work needs to be done to compare the relative contiguity of land protected by easements across various jurisdictions,<sup>194</sup> particularly to determine

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<sup>192</sup> See, e.g., Parker, *supra* note 125, at 17–18 (noting that “[l]and conservation for some purposes is more valuable when parcels of adjacent land can be combined than when land is conserved in isolated pieces,” but suggesting that land trusts protecting land through privately held conservation easements have a difficult time in assembling such contiguous blocks, and “emphasizing that the IRS requirement of perpetuity is the main reason why it is hard for trusts to conserve contiguous parcels through donated easements”); PIDOT, *supra* note 25, at 15 (noting that “[m]ost conservation easements are driven by ad hoc forces and opportunities,” and therefore “may result in scattered ‘green sprawl,’” though pointing out that Massachusetts’s requirement of public “approval of an easement’s public benefits at both state and local government levels” may alleviate this problem).

<sup>193</sup> For the purposes of this calculation, protected land on the opposite side of the street from land protected by a surveyed restriction was treated as adjacent.

<sup>194</sup> Comparison of the contiguity of protected land across jurisdictions is a useful avenue for further study. Some have suggested that Massachusetts’s public approval process may alleviate the problem of “scattered ‘green sprawl.’” See PIDOT, *supra* note 25, at 15. But other studies have found that private conservation groups in Massachusetts may actually give *less* consideration to the value of connected networks of conservation land reserves than private conservation groups in other states, such as California. See COLL. OF AGRIC., CONSUMER

whether the Massachusetts model — which involves local approval and therefore presumably greater knowledge about whether easement-protected land will abut or unite previously protected parcels — serves to encourage such contiguity.

#### 4. *Access, Contiguity, Specific Benefits, and Massachusetts Public Review*

The relative frequency among the surveyed restrictions of public access, contiguity with other protected lands, and highly specific descriptions of protected land and public purpose sheds light on the typical defenses and criticisms of conservation easement practice. Considered together, these three categories of specific benefits shed additional light on Massachusetts' elaborate public approval process, which, as discussed elsewhere in this Article, has been cited as a model for other jurisdictions across the country. Roughly thirty-four percent of the total surveyed restrictions expressly provide for some form of previously unrecognized public access.<sup>195</sup> Another fifteen percent expressly recognize that the protected land is adjacent to other protected land, without containing any provision for, or recognition of, public access.<sup>196</sup> Finally, slightly more than thirteen percent of the total surveyed restrictions contain the extremely specific statements of public benefit or descriptions of the protected land discussed in Part III.D.2 above, without containing any provision for, or recognition of, public access, and without any recognition of contiguity with other protected land. All told, over sixty-two percent of the surveyed restrictions contain at least one provision for previously unrecognized public access, an express recognition of contiguity with other protected land, or a land-specific statement of some additional express public benefit.

In other words, whether by design, accident, or some combination of the two, almost two-thirds of the surveyed restrictions that passed through Massachusetts' elaborate public approval system include at least one specific and relatively salient public benefit. As acknowledged above, this does not mean that the stated specific benefits justify the costs and burdens of protecting the land at issue, nor that the decision to approve conservation restrictions for these lots rather than some other conservation alternative was necessarily an efficient or wise one, nor that the decision makers involved in the public approval process actually considered these specific, expressly stated public benefits in approving these surveyed restrictions. It does, how-

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& ENVTL. SCIS., UNIV. OF ILL., *Private and Public Land Conservation*, in REPORT ON RESEARCH (2007), available at [http://research.aces.illinois.edu/system/files/ACE\\_conservation.pdf](http://research.aces.illinois.edu/system/files/ACE_conservation.pdf).

<sup>195</sup> This figure omits the 2.5% of surveyed restrictions that recognize pre-existing public access to the protected land.

<sup>196</sup> This is obviously a subset of the roughly twenty-five percent of all surveyed restrictions which recognize that the protected land is adjacent to other protected land; the remainder of this subset is comprised of restrictions that contain provisions for public access along with a recognition of contiguity with other protected land.

ever, demonstrate that many of the surveyed conservation restrictions present at least one specific purported public benefit for public approval in a relatively straightforward and transparent manner. More work should be done to compare this specificity with the specificity of purported public benefits provided by conservation alternatives such as legislation and regulation. If the Massachusetts public approval process for conservation easements provides a clearer or more intimate appreciation of the benefits of protecting the land at issue than such alternatives, then the choice to forego these alternatives and to protect these lands through conservation restrictions may be defensible, even if the full costs of these conservation restrictions are less clear than alternative methods of conservation.

##### 5. *Variations in Local Lot Sizes and the Potential for Inter-Local Sorting*

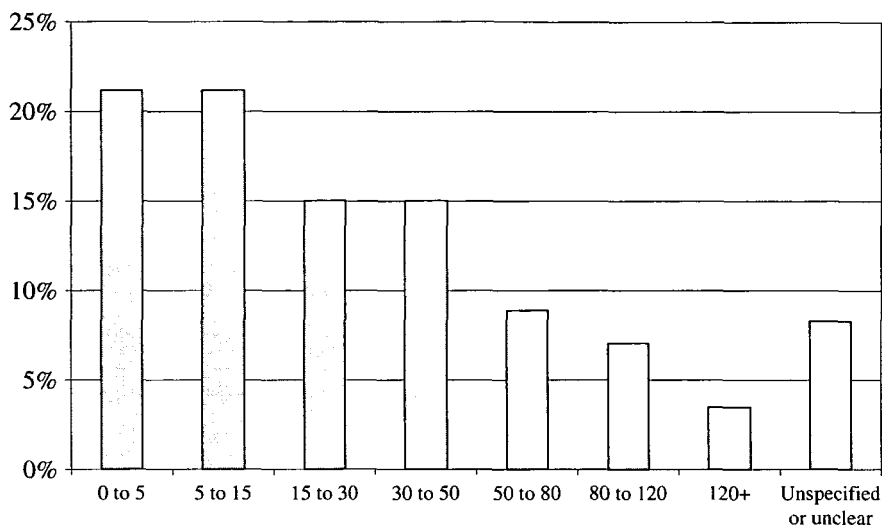
As noted above, the conservation restrictions reviewed in the course of this survey protect land in several Massachusetts counties and dozens of diverse communities from the Berkshires to Martha's Vineyard.<sup>197</sup> The size of the lots protected by the conservation restrictions in this survey is similarly broad, as shown in Figure 3. This is perhaps unsurprising, given that the conservation restrictions examined in this survey range across so many different parts of Massachusetts.

However, although the variations in covered lot size across the surveyed easements may be related to the location of the easement, it is impossible to draw such a definite conclusion from the results of this limited initial survey. More work is needed in the future to assess this possible connection, as well as the possibility that any regional differences in easement-covered lot size or the types of covered land may create possibilities for the sort of inter-local competition discussed above. But regardless of whether these potential variations in lot size are reflective of significant regional differences, the size variations in the survey do suggest, at a minimum, that the surveyed restrictions can be and are being applied to many different types of land, ranging from smaller lots that might not seem out of place among typical suburban or exurban communities to larger lots that might accommodate larger rural farms, fields, and forests.

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<sup>197</sup> Easements in the survey range from Williamstown in Massachusetts's northwest corner to Chilmark on Martha's Vineyard. The surveyed easements are also drawn from communities with significant socioeconomic diversity, such as Weston and Westfield. The estimated 2007 median household income in Weston was \$189,041; the same figure for Westfield was \$52,206. See City-Data.com, <http://www.city-data.com/> (search "Get a detailed profile" for "Weston, MA" and "Westfield, MA") (last visited Dec. 31, 2009) (on file with the Harvard Law School Library). The median household income in 2007 for Massachusetts was \$62,365. *Id.* While the easements in this Article's survey protect land in Massachusetts communities with varying socioeconomic levels, many of the communities involved are relatively affluent compared to the Massachusetts median, which should be kept in mind when considering the distributional criticisms of contemporary conservation easement practice.

FIGURE 3. RELATIVE SIZE OF SURVEYED RESTRICTIONS (IN ACRES)



### *E. Potential Problems in the Survey*

While many aspects of this Article's survey of Massachusetts restrictions reveal relatively positive aspects of contemporary practice, the survey's results also indicate at least two potentially troubling trends. First, the restrictions reviewed in the survey indicate that some land trusts and donors are aware of the potential methods of future easement modification and extinguishment discussed in the academic literature, and that they draft facially permanent easements that will impose additional costs for modification or extinguishment, thereby potentially exacerbating the problem of permanence discussed above. Second, the specifically forbidden landowner uses in the surveyed restrictions were more likely to be composed of standard boilerplate language than the specifically permitted landowner uses. This may suggest that the surveyed restrictions are not, at least in the short term, imposing any substantial changes on the grantor landowners of the protected land despite the presumably substantial cost to the public fisc of the deductions taken for their donation. These two issues are discussed in greater detail immediately below.

#### *1. Amendment, Extinguishment, and the Problem of Permanence*

As noted above, Massachusetts law requires that amendments to approved restrictions must be submitted to the same public approval process as

the initial restriction itself.<sup>198</sup> Over forty of the surveyed restrictions, or about thirty-five percent, contain boilerplate provisions that raise the possibility of amendment along the lines required by Massachusetts law, provided that the amendment would ultimately have neutral or strengthening effects on the conservation purposes of the restriction. In other words, insofar as the surveyed restrictions expressly discuss the possibility of amendment under the Massachusetts statute, they tend to do so only in terms of amendments that would *increase* future limitations on development of the protected land.

Very few of the surveyed restrictions provide for extinguishment under the terms of the restriction itself,<sup>199</sup> but many contemplate the possibility of extinguishment through condemnation or eminent domain.<sup>200</sup> For example, almost a hundred of the surveyed restrictions, or around eighty-eight percent of the total, vest a proportion of the property's value in the land trust holding the restriction. These vesting clauses typically continue to state that this proportional value can be recovered by the grantee land trust if the property and restriction are ever extinguished, with many restrictions specifying extinguishment by condemnation, eminent domain, or other public action, provided that this recovered proportional value is then put to conservation purposes. In so doing, these vesting clauses may well minimize the problem of perpetuity for future actors by preserving the value of the current pro-conservation choice in a flexible form, should the present restrictions be extinguished through condemnation or other similar means. On the other hand, roughly the same number of the surveyed restrictions, or around eighty-five percent of the total, require the grantor or fee owner and the grantee land trust to jointly resist any condemnation efforts that might threaten the preserved uses of the land or the existence of the restriction. In so doing, these resistance clauses may increase the costs on future actors who seek to eliminate conservation restrictions through condemnation, thereby exacerbating the problem of perpetuity.

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<sup>198</sup> See *supra* note 161.

<sup>199</sup> There are two notable exceptions in the survey. One easement contains a provision allowing the easement holder to release the easement in whole or in part; however, the easement also includes a general severability clause, which ensures that if the release provision is held to be unenforceable in any respect, the remaining restriction shall be construed as though the provision "had not been included in it." Conservation restriction grant to Belchertown Land Trust, *supra* note 178. Another easement contains a provision that might be construed to limit the application of the cy pres doctrine to subsequently modify or extinguish the restriction while protecting the donor's original intent. This easement provides that any changes to the surrounding land, or any change in the economic value of the burdened land, "shall not be deemed to be changed conditions permitting termination of this Conservation Restriction." Conservation restriction grant to Winding River Land Conservancy, *supra* note 179. Cf. McLaughlin, *supra* note 116 (suggesting that courts should apply cy pres when changed conditions render an easement's stated goals impossible or impracticable).

<sup>200</sup> Cf. McLaughlin, *supra* note 116, at 430 (discussing how conservation easements can and should be condemned if necessary, and how just compensation for the condemnation should be apportioned between the fee holder and the easement holder).

A similar potential problem is created by clauses in some very recent restrictions in the survey that contemplate the possibility of future extinguishment through merger. More specifically, some of these restrictions contain clauses expressly providing that the conservation restriction will survive any merger with the remaining fee interest if the two are ever owned together by the same holder. While there are only ten restrictions with these “non-merger” or “no merger” clauses, making up only a little less than nine percent of the total, all but one of them have been created since December 2006, suggesting the existence of an increasing trend to include such clauses.<sup>201</sup> These “no merger” restrictions make up a substantial portion of the most recent restrictions in the survey: over one-quarter of all the restrictions from 2005 to the present contain such a “no merger” clause.

Two other trends revealed by this survey also suggest that land trusts are using conservation restrictions in heretofore unexpected or unexamined ways that will increase the costs and burdens faced by future actors who seek to undo the restrictions. First, some of the restrictions surveyed are held jointly by more than one land trust, or are held jointly by a land trust and a local governmental body. These joint holdings may be a way for land trusts to pool their limited resources and ameliorate the costs of properly monitoring and, if necessary, enforcing these restrictions. However, jointly held restrictions may carry unintended consequences related to the problem of permanence: it is reasonable to assume that they will be even more difficult to amend or extinguish in the future than singly held restrictions.

Second, in a few cases, some of the trusts whose holdings were examined in the course of this survey were found to have *granted* conservation restrictions to local governments or to other land trusts on land that the grantor land trust already held for conservation purposes in fee outright.<sup>202</sup> More work should be done to determine how widely these layered easements are being used, but their existence indicates a potentially new facet to the problem of permanence identified by some critics of current conservation practice. Because the underlying land is already owned by the grantor land trust, these layered restrictions essentially have no other function besides increasing the costs and barriers on future actors who may wish to alter specific present conservation choices. Put another way, one might argue that these layered restrictions only exacerbate the problem of permanence without offering any additional conservation benefits in the present or foreseeable future.

Considered as a whole, these final survey results suggest that many of the abstract concerns about lock-in and the unknown future costs of amending or extinguishing conservation restrictions may be justified. While some provisions of the surveyed restrictions preserve the present conservation

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<sup>201</sup> Moreover, this one exception is a relatively new restriction as well, dating back only to June 2004. See conservation restriction grant to Winding River Land Conservancy (recorded June 23, 2004, at Hampden County Deeds, bk. 14275, p. 433).

<sup>202</sup> These layered easements were essentially found by accident, when various land trusts were entered into the online registries as both grantors and grantees.

value while creating flexibility for future decision makers, the surveyed easements also tend to have provisions that will likely impose additional obstacles on future actors who seek to amend or eliminate them through the various methods discussed above.<sup>203</sup> Indeed, many of the obstacles to future amendment or extinguishment revealed by this survey have not been considered or discussed in the legal academic literature, even by critics of current conservation easement practice.

Some of these procedural obstacles arise from the way some of the surveyed restrictions are drafted, such as the inclusion of non-merger provisions and provisions requiring restriction holders and landowners to cooperate in the face of condemnation efforts. Other procedural obstacles in the surveyed restrictions are not related to any particular clause, but rather arise from the creative use of conservation restrictions. In practice, this Article's review and survey reveal that easements are sometimes jointly held by multiple conservation organizations, or granted by a land trust on land it already owns for conservation purposes, thereby creating an additional layer of obstacles for future actors with different conservation needs or priorities. But the survey also indicates that a very large majority of the surveyed restrictions vest a proportion of the burdened property's value in the land trust, thereby demonstrating some of the flexibility conservation easements can provide in response to changed future conditions, by preserving the value of the pro-conservation choice if the easement is dissolved by future actors. Nevertheless, on balance, these results suggest that critics concerned about the problem of lock-in posed by current conservation easement practice may be more right than they know. This survey suggests that in practice, private land trusts are drafting and using conservation easements in creative and unforeseen ways that may impose additional, unexamined costs on future actors who might wish to alter present conservation choices.

## 2. *Possible Limits on Public Benefits*

The lists of forbidden uses in the surveyed restrictions are largely made up of nearly identical boilerplate, which nearly or exactly tracks the list of activities that the Massachusetts Restriction Statute requires an instrument to limit or forbid in order to be treated as a conservation restriction.<sup>203</sup> All seven of these statutory prohibitions — such as the construction or placement of buildings or other structures; the dumping of soil, trash, or other unsightly materials; or any other activities detrimental to drainage, flood or erosion control, and water or soil conservation — appear as boilerplate forbidden uses in many of the surveyed restrictions. Additional boilerplate restrictions not required by statute appear in many but not all of the surveyed restrictions, such as prohibitions on subdivision,<sup>204</sup> hunting,<sup>205</sup> the use of mo-

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<sup>203</sup> See MASS. GEN. LAWS ch. 184, § 31 (2008).

<sup>204</sup> E.g., conservation restriction grant to Bolton Conservation Trust (recorded Sept. 12, 2005, at Worcester South District Deeds, bk. 37287, p. 302).

torized vehicles,<sup>206</sup> commercial recreational activities,<sup>207</sup> as well as various catch-all provisions prohibiting any activity not in keeping with the restriction's conservation purposes. However, while additional boilerplate restrictions are fairly common in the survey, there are very few additional specific restrictions in the survey that are tied to any particular feature of, or perceived problem with, the protected land. Around fourteen of the surveyed restrictions, or twelve percent of the total, contain a prohibition or impose a duty upon the grantor landowner tied to some specific feature, portion, or possible use of the land, and phrased in a manner beyond the boilerplate discussed above. Examples include a prohibition on changes to a historic well except for safety reasons<sup>208</sup> and requirements that the grantors mow or otherwise maintain specific portions of the protected land in a particular condition (such as historic Scots-Irish potato fields).<sup>209</sup>

The lists of permitted uses, on the other hand, contain similar amounts of boilerplate but greater numbers of restriction- and lot-specific provisions. Some of these common boilerplate permitted uses, or uses specifically reserved to the grantor or underlying fee owner, include passive recreational use,<sup>210</sup> the right to manage vegetation and to eliminate non-native species,<sup>211</sup> agriculture,<sup>212</sup> and archaeology.<sup>213</sup> Over seventy of the surveyed restrictions, or over sixty percent of the total, also contain a specific permitted use that is either tied to some specific feature or portion of the protected land, some specific or clearly contemplated future use, or conditional permission for some specific use that required grantee approval. Examples of such specific permitted uses include maintenance of historic cemeteries,<sup>214</sup> the right to construct septic systems or tennis courts,<sup>215</sup> the right to build various specified residential or agricultural structures,<sup>216</sup> the right to use the land for religious purposes,<sup>217</sup> and even the right to subdivide the property within certain

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<sup>205</sup> *E.g.*, conservation restriction grant to Williamstown Rural Lands Foundation (recorded Dec. 31, 1990, at Berkshire North District Deeds, bk. 824, p. 391).

<sup>206</sup> *E.g.*, conservation restriction grant to Opacum Land Trust, *supra* note 189.

<sup>207</sup> *E.g.*, conservation restriction grant to Sheffield Land Trust (recorded Dec. 28, 2004, at Berkshire South District Deeds, bk. 1586, p. 82).

<sup>208</sup> *E.g.*, conservation restriction grant to Rattlesnake Gutter Trust (recorded May 10, 2004, at Franklin County Deeds, bk. 4591, p. 113).

<sup>209</sup> *E.g.*, conservation restriction grant to Kestrel Trust, *supra* note 186.

<sup>210</sup> *E.g.*, conservation restriction grant to Sheffield Land Trust, *supra* note 207.

<sup>211</sup> *E.g.*, conservation restriction grant to Winding River Land Conservancy (recorded Jan. 8, 2009, at Hampshire County Deeds, bk. 9676, p. 305).

<sup>212</sup> *E.g.*, conservation restriction grant to Bolton Conservation Trust (recorded Dec. 23, 1998, at Worcester South District Deeds, bk. 20839, p. 190).

<sup>213</sup> *E.g.*, conservation restriction grant to Carlisle Conservation Foundation (recorded Oct. 26, 2007, at Middlesex North Deeds, bk. 21698, p. 247).

<sup>214</sup> *E.g.*, conservation restriction grant to Bolton Conservation Trust (recorded Dec. 26, 1990, at Worcester South District Deeds, bk. 13166, p. 339).

<sup>215</sup> *E.g.*, conservation restriction grant to Egremont Land Trust (recorded Dec. 27, 2005, at Berkshire South District Deeds, bk. 1668, p. 149).

<sup>216</sup> *E.g.*, conservation restriction grant to Opacum Land Trust, *supra* note 189.

<sup>217</sup> *Id.*



limits.<sup>218</sup> On the one hand, the fact that landowners are able to carve out a relatively high rate of specific permitted uses in the surveyed restrictions, compared to the relatively low rate of specific forbidden uses, may suggest that the surveyed restrictions are not, at least in the short term, imposing any substantial changes on the grantor landowners of the protected land. On the other hand, the underlying flexibility this disparity shows may suggest that the surveyed restrictions are able to bring some lands under conservation more cheaply, or at least more quickly, than other conservation alternatives.

### CONCLUSION

After examining the surveyed restrictions in light of the concerns raised by critics and reformers of current conservation easement practice, a number of general conclusions can be drawn. From the outset, this Article has tracked the significance of the federal tax deduction to the recent growth of conservation easements and land trusts, as well as to current conservation easement practice. Unsurprisingly, the federal tax deduction likely played an important role in the creation of many of the surveyed restrictions: almost all of the surveyed restrictions were donated, not purchased, and the increases in restriction creation in this limited survey generally track the expansion of the federal deduction. With respect to the period since 2005, for which we lack reliable national figures, the survey results suggest that in Massachusetts, at least, the rate of increase has *continued* to accelerate, which is perhaps unsurprising given the further expansion of the federal deduction during this period.

This Article has also attempted to track the extent and impact of the problem of fraudulent easement donations, to determine whether the Massachusetts model can satisfy related concerns about transparency and the public approval process raised by critics and would-be reformers of current practice alike. Despite legitimate popular and academic concerns about tax scams arising from improper deductions based on fraudulent easements, a relatively high number of the surveyed restrictions offer specific, clearly articulated public benefits, such as creating new public rights of access or helping to form and protect contiguous blocks of protected land. This suggests that the problem of fraud may be less widespread than some might believe, at least under the Massachusetts system of layered public review. It also suggests that under the Massachusetts model, in many instances land trusts and easement donors are providing clear and transparent statements of public value to the public review. On the other hand, the surveyed restrictions contain far more land- or landowner-specific permitted uses than land- or community-specific forbidden uses. This may suggest that the restrictions do not substantially change landowner behavior or provide additional public

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<sup>218</sup> *E.g.*, conservation restriction grant to Egremont Land Trust (recorded Dec. 22, 2004, at Berkshire South District Deeds, bk. 1584, p. 180).

benefits beyond those specifically articulated, despite the great cost of the easements in terms of foregone tax revenue.

This Article has also attempted to track and test various justifications and potential reforms for conservation easements. While the future costs associated with easements' facial permanence are uncertain, and while even current costs of conservation restrictions may be difficult to survey, protected as they are by appraisals that are usually not available in the public record, the current benefits of conservation easements should not remain obscure. With respect to public access — one of the most important and well-defined public benefits that conservation easements can offer — this Article's survey reveals that a substantial minority of conservation easements in Massachusetts create at least some new form of public access. At the same time, the survey's results may indicate that some of the variations in access arise from differences between individual land trusts, rather than any underlying characteristics of the protected land itself or its region — though given the limited nature of this initial survey, it is impossible to draw any definite conclusions. The survey also revealed restrictions protecting lots of widely varying sizes, which may be attributable to consistent differences at the regional level, although such a conclusion cannot be drawn from the results of this limited initial survey.

Finally, this Article has attempted to track and test the problem of permanence identified by some academic critics of current conservation easement practice, and the results of this Article's survey suggest that the problem of permanence may be at least as bad as some critics have suggested, because many of the restrictions surveyed appear to pose new and creative roadblocks to future extinguishment. In other words, this Article's survey suggests that critics of current conservation practice are correct in their claim that "[l]and trusts . . . are acutely aware that future landowners will mount challenges to development restrictions," and that in response, these land trusts will "construct elaborate defenses to ensure that landowners who try to free their lands from such restrictions will fail,"<sup>219</sup> or will at least be subject to substantial costs and uncertainty in the attempt.

Indeed, this Article's survey suggests that some of the more recent and elaborate defenses currently incorporated into conservation easements will impose barriers which even current academic critics have not fully contemplated, and which may directly counter some proposals for the future extinguishment of conservation easements raised by those who seek to reform or defend current practice. As this Article has suggested, the problem of permanence may be particularly thorny because fraud by parties seeking merely to exploit the federal tax deduction may give honest or "good" land trusts an incentive to make the easements they hold even more "permanent" in order to counter any possible appearance of fraud. There are no easy solutions to this problem because the scope of the federal deduction, and its related requirement of facial permanence, continue to expand even after recent well-

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<sup>219</sup> Mahoney, *supra* note 14, at 772.

publicized scandals. In other words, private land trusts that hold, enforce, and frequently draft conservation easements will likely continue to have incentives to make their restrictions as facially "permanent" as possible, regardless of the potential costs to future actors.

Finally, by its nature, this Article and its survey could not address the final justification for current conservation practice suggested earlier, namely, the potential for increased local bonding and the creation of social capital that may arise from the sorts of civic involvement that organizations such as the Dunstable Rural Land Trust may foster. However, if there is a justification for current practice sufficient to outweigh the probable costs of facially permanent easements to future generations, then the problem of permanence and this Article's survey suggest that it cannot rest entirely upon the static conservation values found in today's facially permanent easements. Rather, it must include a new focus on the potential creation of social capital and the encouragement of volunteerism that land trusts may create,<sup>220</sup> and a renewed emphasis on public access to lands for recreation, education, and monitoring wherever possible, to help ensure that the protections and restrictions set in place today remain valuable to the public in the future. Put another way, land trusts and conservation advocates might find that the best justification for current conservation easement practice is based, at least in part, on community norms and social values that have little to do with the stated conservation purposes. Moreover, this justification based on increased local bonding and the creation of social capital may be somewhat undermined by the extremely rapid rate of growth and the sheer amount of land recently subjected to easements, if, for example, land trusts find themselves unable to carry out their commitments to the community by monitoring and enforcing the restrictions on the easements they hold.<sup>221</sup>

To some, it may seem naïve or worse to suggest that more hay rides and winter festivals could ever justify, even in part, the potential billions in foregone tax revenue caused by current conservation easement practice.<sup>222</sup> This skepticism may be justified. Conservation easements in their current

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<sup>220</sup> The creation of social capital and increased volunteerism may become increasingly important, given that these social values are arguably in relative decline. *See, e.g.*, PUTNAM, *supra* note 144, at 132 (noting that despite the overall increase in volunteering in recent decades, it is largely concentrated in an older "long civic generation," and that in any event "the type of volunteering that involves community projects" has been in a period of absolute decline).

<sup>221</sup> Indeed, the example of the Dunstable Rural Land Trust shows that land trusts can engage in this sort of potentially beneficial social capital creation even if — or perhaps even because — they protect a substantial portion of land through outright fee ownership, rather than conservation easements. The rate of land trust growth and the rate of increase in the total amount of protected land may be far smaller if land trusts focus more on fee acquisitions and relegate easement acquisitions to a smaller role, perhaps primarily to acquire especially valuable, sensitive, or at-risk land or land particularly subject to development pressures. But at the same time, such an approach might ameliorate the concerns raised by some critics and reformers and tested in the course of this Article.

<sup>222</sup> *But see, e.g.*, PUTNAM, *supra* note 144, at 414 (noting that "Henry Ward Beecher's advice a century ago to 'multiply picnics' is not entirely ridiculous today" because of the individual and collective value of increasing this sort of civic activity).

form simply may not be worth what is paid for them now and what future actors may have to pay to fix them or get rid of them. But the survey results presented in this Article, and the corroboration they provide for critics who claim that the facial permanence of contemporary easements will impose substantial costs upon future generations, indicate that those who would continue to defend the current practice may need to rely upon something like this seemingly naïve social capital justification. More work must be done, of course, before the social capital these land trusts create becomes a substantial and measurable response to the problem of permanence identified by critics of current practice. To begin, land trusts must focus less on the total number of acres they protect, and instead increase their civic involvement, while doing more to publicize existing efforts to engage community members and to promote volunteerism. It is equally important, however, that scholars and commentators explore and define new and measurable ways to capture the potential social value created by conservation easements and private land trusts,<sup>223</sup> so that the creation of social capital does not remain an abstract response to the problems with current practice discussed elsewhere in this Article. The real promise of privately held conservation easements, then, may not rest solely on whether they represent a new and flexible method to reconcile heretofore conflicting goals of development and preservation,<sup>224</sup> but rather on whether the local and regional land trusts that hold these conservation easements are able to use them as tools to knit their communities more closely together and, in so doing, capitalize on their full potential conservation value.

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<sup>223</sup> While such work is beyond the scope of this Article, potential examples might include quantifying the number of visits by community members to a particular land trust's easement-protected land in a given year, or assessing the amount of time spent or number of participants in a particular land trust's volunteer activities in a particular year.

<sup>224</sup> Cf. Barnes, *supra* note 1.